INDEX.

Statement of Case 1
Statement of Facts 2
Preliminary objection that this Court has no authority to answer these questions 7
Only questions arising in cases within the appellate jurisdiction of the Circuit Court of Appeals can be certified to the Supreme Court 7
The jurisdiction of the Circuit Court of Appeals to issue the writ of prohibition is an original jurisdiction 8
The questions certified have not arisen in any case within the appellate jurisdiction of the Circuit Court of Appeals as defined in Sec. 128 14
The questions submitted do not appear to be of such nature as to call upon the court to answer them 15
Consideration of Question I-A:
"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expiration of the term at which the judgment was entered, said District Court has indicated its intention to enter an order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term and not ap-

PAGE

pearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?".. 20

No writ of error lies in favor of the government in a criminal case 20

Sec. 262 of the Federal Code does not confer an appellate jurisdiction which the Circuit Court of Appeals would not have without it 21

Meaning of "necessary for exercise of jurisdiction" 23

Answer to Government's brief on this point 31

The Government has no legal right to any relief under the writ of error..... 34

The government cannot question the District Court's jurisdiction 36

Application of Sec. 262 to the Circuit Court of Appeals 39

The consent given in Exhibit A by the United States Attorney deprived the Circuit Court of Appeals of any jurisdiction to issue the writ, even if it would otherwise have had any 41

Conclusion as to Question I-A..... 45

Consideration of Question I-B:

"Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated?" 46

Answer to Government's brief on Question I-B 48

PAGE

Consideration of Question II:

"When a writ of error has been issued to review a judgment of convicion in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?" ... 52

Two objections only can be raised:

I. Lapse of the Term 52

II. Pendency of the writ of error..... 52

Rules of law and arguments to be deduced therefrom, which may affect the power of the District Court to grant a new trial after the lapse of the term..... 53

(a) General rule denying the power of a court to amend its judgments after the term, and gradual tendency to enlarge exceptions to the rule..... 54

(b) *Audita querela* 65

(c) Writ of error *coram nobis* or *coram vobis* 67

(d) Equitable procedure to affect a judgment after the expiration of the term in which it was rendered..... 72

(e) Statutes allowing petitions or motions for new trials after the end of the term in which judgment was rendered 77

(f) A pardon is an inadequate relief for an unjust conviction 80

(g) Decisions on the power of courts to grant, without authority of statute, new

PAGE

trials in criminal cases after the term in which judgment was rendered..... 95

(h) Greater freedom should be allowed in criminal cases than in civil, in granting a new trial 103

(i) Summary of the powers which the United States District Court has, to grant a new trial in a criminal case after the end of the term in which judgment was rendered 106

(j) Even though the lapse of the term deprived the District Court of jurisdiction, the Government's consent to the hearing of the motion for a new trial restored that jurisdiction 118

The pendency of a writ of error when the motion for a new trial was made did not defeat the jurisdiction of the District Court 124

(a) Even though the Government had not consented to the jurisdiction..... 125

(b) Consent to the jurisdiction of the District Court involves consent to the discontinuance of the writ of error, if the District Court grants a new trial, and therefore, avoids any possible objection due to the pendency of the writ of error 128

Answer to Government's brief on Question II 130

Consideration of Question III:

"Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States attorney there-

PAGE

upon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the Court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?" 131

Statement of real question at issue 131

Motive of the Government in giving its consent in Exhibit A is immaterial 133

Authorities indicate that failure to object to jurisdiction debars the right to the writ. 134

The Government is debarred from the writ because it has no standing in the Circuit Court of Appeals upon the writ of error. 139

Answer to Government's brief on Question III 140

Cases Cited.

PAGE

Adams vs. Jones, 12 Peters, 207 15
Adler vs. State, 35 Ark., 517 .....68, 72
"An action at Law in the Reign of Edward III," by Luke O. Pike, 7 Harvard Law Rev., 266 55
Andersen vs. State, 43 Conn., 514, 517..... 104
Anderson vs. Thompson, 7 Lea., 259..... 124
Appo. vs. People, 20 N. Y., 531..... 96
Asbell vs. State, 62 Kans., 209 96
Austin vs. U. S., 155 U. S., 417..... 88
Avery vs. United States, 12 Wall., 304..... 67
Bank of the United States vs. Moss, 6 How., 31 62
Barbour Asphalt Paving Co. vs. Morris, 132 Fed., 945 24
Bath County vs. Amy, 13 Wall., 244.....11, 22
Beard vs. State, 81 Ark., 515..... 96
Belknap vs. U. S., 150 U. S., 588..... 125
Berry vs. Nall, 54 Ala., 446..... 122
Birnbaum vs. May, 170 N. Y., 314..... 127
Bishop's New Criminal Procedure, §1273..... 103
Blackstone's Comm. (Vol. 3), 406.....57, 65
Bracton, Vol. 2, page 371 (Twiss's Transation) 82
Bradford vs. U. S., 228 U. S., 446..... 88
Britton, Book 1, ch. 1, Sec. 11 (Nichols's translation) 55
Bronson vs. Schulten, 104 U. S., 410....63, 64, 69
Burchett vs. U. S., 194 Fed. Rep., 821..... 128
Central Trust Co. vs. McGeorge, 151 U. S., 129 119
C. B. & Q. Ry. Co. vs. Williams, 214 U. S., 492 16
C. B. & Q. Ry. Co. vs. Williams, 205 U. S., 444 16

PAGE

Chitty Crim. Law (2nd Ed.), 748..... 69
Cohens vs. Virginia, 6 Wheat., 264..... 128
Co. Litt., 260a 58
Cook vs. Smith, 58 Ia., 607..... 127
Covington Bridge Co. vs. Hager, 203 U. S., 109 .....11, 22, 23
Crookes vs. Maxwell, 6 Blatch., 468..... 101
Cross vs. Evans, 167 U. S., 60..... 16
Cuddington vs. Wilkins, Hobart, 81..... 86
Cummins vs. Kennedy, 4 J. J. Marsh., 642... 73
Dobbs vs. State, 62 Kans., 108..... 96
Emsheimer vs. New Orleans, 186 U. S., 33.... 16
Ex parte Garland, 4 Wall., 333.....87, 88, 94
Ex parte Russell, 13 Wall., 664..... 79
Ex parte United States, 226 U. S., 420.....25, 27
Ex parte Warmouth, 17 Wall., 64..... 23
Falk vs. The People, 42 Ill., 331..... 105
Farnsworth vs. Montana, 129 U. S., 104..... 8
Fitz Herbert, Nat. Br., 238..... 66
Folan vs. Folan, 59 Me., 566..... 67
Foster's Fed. Practice, Vol. 2, 5th Edition, Sec. 448 76
Fricke vs. The State, 11 Tex. App., 6..... 127
Fugate vs. State, 85 Miss., 94..... 96
Fuller vs. U. S., 182 U. S., 562.....76, 77, 79, 125 126, 127, 130
Gage vs. City of Chicago, 141 Ill., 642..... 120
Gager vs. Doe, 29 Ala., 341..... 121
Gagnon vs. United States, 193 U. S., 451....64, 70
Gottleib vs. Jasper & Co., 27 Kan., 770..... 79
Gracie vs. Palmer, 8 Wheat., 699..... 119
Gross vs. Wood, 117 Md., 665..... 99
Hamlin vs. State, 67 Kans., 724..... 96
Harmon vs. Martin, 52 Vt., 255..... 67
Harris vs. Brooker, 8 Wash., 138.....137, 138
Harris vs. Hardeman, 14 How., 334..... 107

PAGE

Harrison vs. Osborn (Okla.), 114 Pac. Rep., 331 124
Harvey vs. Fink, 111 Ind., 249..... 78
Hart vs. U. S., 118 U. S., 62..... 88
Havemeyer vs. Ia. Co., 3 Wall., 294..... 15
Henry vs. Allen, 147 N. Y., 346..... 127
Hewetson vs. City of Chicago, 172 Ill., 112... 121
Hines vs. Driver, 89 Ind., 339..... 78
Holt vs. State, 78 Miss., 631..... 96
Howard vs. State, 58 Ark., 229..... 96
Hydrick vs. State (Ark.), 148 S. W. Rep., 541 72
Irwin vs. Grey, L. R., 2 H. L., 20..... 68
Jewell vs. Knight, 123 U. S., 426..... 16
Johnson vs. St. Louis, &c., Railway, 141 U. S., 602 126
Johnson vs. Stimmel, 89 N. Y., 117..... 124
Keliher vs. U. S., 193 Fed., 8 .....104, 105
Kepner vs. U. S., 195 U. S., 100 21
Kidd and Stainton vs. McMillan, 21 Ala., 325 123
Kinch vs. State, 156 S. W. Rep., 649 96
Klink vs. People, 16 Colo., 467 96
Land vs. Williams, 12 Sm. & M., 362 68
Latham vs. U. S., 9 Wall., 145 35
Leache vs. State, 22 Tex. App., 279 96
Little Rock vs. Bullock, 6 Ark., 282 124
Manning vs. German Life Ins. Co., 107 Fed., 52 38
Martin's Admr. vs. B. & O. R. R. Co., 151 U. S., 673 119
Maynard vs. Hecht, 151 U. S., 324 7
McClellan vs. Carland, 217 U. S., 268, 10, 24, 48, 49, 50
McClung vs. Silliman, 6 Wheat., 598...10, 22, 38
McCord-Collins Co. vs. Stern (Tex. Civ. App.) 61 S. W. Rep., 341 124

PAGE

McHam vs. Gentry, 33 Tex., 441 124
McLish vs. Roff, 141 U. S., 661 38
Mexican Central Ry. Co. vs. Eckman, 187 U. S., 429 38
Minnesota vs. Hitchcock, 185 U. S., 373 51
Mitchell vs. State, 60 Ala., 26 105
Moran vs. Hagerman, 151 U. S., 329 7
National Home vs. Overholser, 64 Ohio St., 517 124
Nations vs. Johnson, 24 How., 195 128
Nelson vs. Meehan, 155 Fed., 1 38
Newman vs. Newton, 14 Fed. Rep., 634 124
Owens vs. State, 35 Tex., 361 105
Phillips vs. Negley, 117 U. S., 665 .....63, 99
Philips vs. Smith, 1 Strange, 136 .....60, 61
Pickford vs. Talbott, 225 U. S., 651 74
Platt vs. Threadgill, 80 Fed. Rep., 192 76
Pollock and Maitland's History of English Law, Vol. 2, page 481 84
Powell vs. Gott, 13 Mo., 458 69
Public Schools vs. Walker, 9 Wall., 603 64
Pulton, *de Pace Regis*, 218 85
Queen vs. Tutchin, 1 Salk., 51 62
Re Alix, 166 U. S., 136 135
Re Chetwood, 165 U. S., 443 .....48, 50, 128
Re Huguley Mfg. Co., 184 U. S., 301 ...38, 134
Re Massachusetts, 197 U. S., 482 .....11, 22
Re Metropolitan Trust Co., 218 U. S., 312 .. 64
Re Moore, 209 U. S., 490 119
Re Paquet, 114 Fed., 437 23
Re Potts, 166 U. S., 263 126
Re Rice, 155 U. S., 396 .....135, 137, 138
Re Williams, 123 Fed., 321 10
Reg. vs. Murphy, L. R., 2 P. C., 535 115

PAGE

Rex. vs. Hancox, 29 T. L. Rep., 331 92
Rex. vs. Wilkes, 4 Burr., 2527, 2551 71
Rhode Island vs. Massachusetts, 12 Pet., 657 .....31, 33
Rookwood's Case, Holt 683..... 86
Royal Trust Company vs. Exchange Bank, 55 Neb., 663 123
Saleen vs. People, 41 Colo., 317 .....96, 111
Sanders vs. State, 85 Ind., 318 .....68, 72, 90
Selden Society's Publications, Maitland's Int., Vol. 1, pages IX, X 56
Smith vs. Whitney, 116 U. S., 167 135
Sparf vs. U. S., 156 U. S., 51 115
State vs. Armstrong, 41 Wash., 601 96
State vs. Calhoun, 50 Kan., 523 .....68, 69, 72
State vs. Callahan, 47 La. Ann., 444 104
State vs. Clarkson, 88 Mo. App., 553 69
State vs. David, 14 So. Car., 428 97
State vs. Hammond, 5 Strob., 91 105
State vs. Johnson, 40 Conn., 136 104
State vs. Meshek, 61 Ia., 316 105
State vs. Offutt, 38 La. Ann., 364 128
State vs. Superior Court, 15 Wash., 339 96
State vs. Tomlinson, 11 Ia., 401 105
State vs. White, 75 Mo. App., 257 69
State vs. Williams, 147 Mo., 14 96
State vs. Wise, 83 Ia., 596 105
Stat., 11 Henry IV, c. 3 58
St. Louis & San Francisco Ry. vs. McBride, 141 U. S., 127 119
Stephen's History of Crim. Law, Vol. I, page 312 .....91, 92
Stone vs. Seaver, 5 Vt., 549 66
Taylor vs. Longworth, 14 Pet., 172 119

PAGE

Texas & Pacific Ry. vs. Cox, 145 U. S., 593 .. 119
Thayer's "Preliminary Treatise on Evidence," page 170 60
The Folmina, 212 U. S., 354 16
Tovey vs. Young, Precedents in Chancery, Case 157 76
Trafton vs. U. S., 147 Fed. Rep., 513 95
Troxdale vs. The State, 9 Humph., 411 106
Tubman vs. Baltimore & Ohio R. R., 190 U. S., 38 64
U. S. vs. Bailey, 9 Peters, 267 15
U. S. vs. Ball, 163 U. S., 662 21
U. S. vs. Britton, 108 U. S., 199 15
U. S. vs. Buzzo, 18 Wall., 125 15
U. S. vs. Dickinson, 213 U. S., 92 49
U. S. vs. Hall, 131 U. S., 50 16
U. S. vs. Harding, 1 Wall. Jr., 127 92
U. S. vs. Jahn, 155 U. S., 109 38
U. S. vs. Millinger, 17 Blatch., 451 101
U. S. vs. Minn. &c. Co., 18 How., 241 35
U. S. vs. N. Y. Central R. Co., 164 Fed Rep., 324 .....96, 102
U. S. vs. Padelford, 9 Wall., 531 88
U. S. vs. Perrin, 131 U. S., 55 37
U. S. vs. Plumer, 3 Cliff., 28 67,68,69
U. S. vs. Radford, 131 Fed. Rep., 378 100
U. S. vs. Rogers, 164 Fed. Rep., 520 96
U. S. vs. Sanges, 144 U. S., 310 20
U. S. vs. Williams, 67 Fed. Rep., 384 .....23, 99
U. S. vs. Young, 94 U. S., 258 .....35, 125
U. S. vs. Zarafonitis, 150 Fed., 97 20
Villars vs. Parry, 1 Ld. Ray., 182 .....60, 100
Wallach vs. Van Riswick, 92 U. S., 202 88
Warner vs. New Orleans, 167 U. S., 467 16

PAGE

Webster vs. Cooper, 10 How., 54 .....15, 19
Western Loan Co. vs. Butte & Boston Min. Co.,
210 U. S., 368, ... 119
Whitney vs. Dick, 202 U. S., 132 .....48, 49, 50
Wickel vs. Mertz, 49 Pa. Sup., 472 99
Wigmore on Evidence, §§523, 1116 87
Wigmore's Article, 3 Col. L. Rev., 438 106
White vs. Turk, 12 Peters, 238 15
Wilson vs. Vance, 55 Ind., 394 124
Zell vs. Judges, etc., 149 Fed., 86 23

Supreme Court of the United States

October Term, 1914.

No. 462.

THE UNITED STATES,
Petitioner,

vs.

Hon. JULIUS M. MAYER, Judge of the District Court of the United States for the Southern District of New York,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Case.

This cause is before this court upon questions certified by the Circuit Court of Appeals for the Second Circuit upon the government's petition for a writ of prohibition to restrain the respondent from entering an order vacating a judgment of conviction and granting a new trial.

Facts.

In March, 1913, Albert Freeman, Julian Hawthorne and Dr. William G. Morton were convicted in the United States District Court for the Southern District of New York upon indictments for conspiracy to defraud by use of the United States mails and for using the mails with intent to defraud. Defendants Hawthorne and Morton abided by their sentences and have served their terms. Freeman sued out his writ of error to the Circuit Court of Apppeals for the Second Circuit; but before the bill of exceptions was settled he made a motion in the District Court for a new trial, claiming that he had not been tried by an impartial tribunal, owing to the unfitness of a juror. At the time the motion was made, the term had expired as to those counts upon which sentence had been pronounced. As to some of the counts sentence had been suspended and as to those counts the term had been extended for five years from the date of the conviction.

The respondent herein, Judge Mayer, had presided at the latter part of the trial and had sentenced the defendants; and the motion for a new trial was heard by him. When it came on for a hearing Judge Mayer himself raised the question of his jurisdiction to grant a new trial in view of the fact that the term had expired, and requested briefs from counsel. Whereupon the United States Attorney, instead of handing in any brief opposing Judge Mayer's jurisdiction, handed in a memorandum (See Ex. A, p. 4 of certificate), in which he said that in view of certain allegations of Freeman's petition reflecting on the

conduct of the United States Attorney's office, he (the United States Attorney) and the government desired Judge Mayer to entertain the motion on its merits; and he added that if the court's decision on that jurisdictional question was in any way dependent on the government's consent, such consent was thereby fully and freely given.

Thereafter Judge Mayer announced that he would hear the motion upon the merits. Thereafter the motion came on for a hearing and was argued by counsel on both sides. At that argument the government counsel raised no question of the court's jurisdiction but argued only to the merits of the motion.

Thereafter Judge Mayer handed down a decision in which he found:

(1) That one of the jurors was prejudiced against the defendants and was unfit to serve as a juror in the case, and could not have rendered an impartial verdict, and that therefore Freeman had not had a fair trial.

(2) That the facts relating to the juror's conduct and unfitness were unknown to Freeman or his counsel until after the expiration of the term at which the cause was tried and until after the writ of error to the Circuit Court of Appeals had been sued out; and that said facts could not have been discovered by them at an earlier date by any reasonable diligence.

(3) And that the facts upon which said new trial was granted were not in the record of the previous trial.

Up to this time the government had never raised any objection to Judge Mayer's jurisdiction in the matter; and the only thing that it had done in that matter was to give the consent in Exhibit A.

Thereafter, and before the order granting the new trial was entered, the government petitioned the Circuit Court of Appeals for the Second Circuit for a writ of prohibition restraining Judge Mayer from entering the order, claiming that by reason of the pendency of the writ of error in the Circuit Court of Appeals and by reason of the expiration of the term at which the trial was had, he was without jurisdiction to make such order and claiming that the government was not bound by its consent given in Exhibit A.

At the argument before the Circuit Court of Appeals upon the petition for the writ, Freeman's counsel raised the objections that the Circuit Court of Appeals did not have jurisdiction to grant the writ of prohibition petitioned, and that by reason of its consent given in Exhibit A, the government was not entitled to the writ of prohibition.

Thereafter the Circuit Court of Appeals certified to this court the four following questions:

QUESTION I.

A. When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expiration of the term at which the judgment was entered, said District Court has indicated its intention to enter an

order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?

B. Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated?

In case question I-A be answered in the affirmative, then—

QUESTION II.

When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?

QUESTION III.

Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States Attorney thereupon

tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?

Respondent's counsel herein first make a preliminary objection to the jurisdiction of the Supreme Court to pass upon the questions. Thereafter the questions will be considered in the order certified.

PRELIMINARY OBJECTION.

THE SUPREME COURT HAS NO AUTHORITY TO ANSWER THESE QUESTIONS.

I.

Only questions arising in cases within the appellate jurisdiction of the Circuit Court of Appeals can be certified to the Supreme Court.

> "An affirmative description of the jurisdiction of the Supreme Court implies a negative on the exercise of such appellate power as is not comprehended within it."
>
> Maynard vs. Hecht, 151 U. S., 324, at foot of page 325.
> Moran vs. Hegeman, 151 U. S., 329.

Unless these questions go to the Supreme Court pursuant to Sec. 239 they cannot go at all. There is no other authority for them. That section provides that questions may be certified by the Circuit Court of Appeals "in any case within its appellate jurisdiction as defined in Sec. 128." Sec. 128 defines the cases within its appellate jurisdiction to be *appeals and writs of error from final decisions of the district court.* Elaboration of argument is unnecessary to show that questions arising in cases which are in the Circuit Court of Appeals by virtue of its original, not appellate jurisdiction, cannot be brought under Sec. 128.

II.

The jurisdiction of the Circuit Court of Appeals to issue the writ of prohibition is an original jurisdiction.

Sec. 262 of the Federal Judicial Code gives to the Supreme Court, the Circuit Court of Appeals and the District Court, the power to issue all writs * * * "which may be necessary for the exercise of their respective jurisdictions," etc.

How far it is true of every writ included under this section, that an application for it is a new proceeding, and not appellate in its nature, it is unnecessary to inquire. It is at least clear that application for a writ of prohibition is an original suit.

In Farnsworth vs. Montana, 129 U. S., 104, 113, this court said:

> "A writ of prohibition is a civil remedy; given in a civil action, as much so as a writ of habeas corpus, which this court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution. Ex parte Tom Tong, 108 U. S., 556."

This statement disposes of both of the only two possible arguments which can be brought forward to show that the questions certified in this case are within the statutory authority of Sec. 128.

These two arguments are:

1. That the application for a writ of prohibition is in substance part of the appellate proceedings

pending in the Circuit Court of Appeals by virtue of the writ of error.

2. That the application is itself an independent appellate proceeding; and that Sec. 262 was intended to give the Supreme Court and the Circuit Court of Appeals an appellate jurisdiction to review, by way of an extraordinary writ, those cases over which they could not obtain appellate jurisdiction by way of writ of error or appeal, and hence that the jurisdiction to issue an extraordinary writ is an appellate jurisdiction.

As to the first of these arguments, it is clear that if the application for prohibition is so far an independent proceeding as to be regarded as a civil suit, though the proceedings to which it has reference are criminal, it can in no sense be part of the proceedings pending in error in the criminal prosecution. Moreover it is a mere accident in this case that a writ of error is pending in the court which is asked to issue the prohibition. Ordinarily, the application for prohibition is the only proceeding in the superior court in which application is made which has any connection with the proceeding which it is sought to prohibit. This was true at common law and is true in England to-day. If it is not true in the Federal courts at the present time it is only because of the restrictions of Sec. 262. It is evident from this that an application for prohibition is a wholly separate suit, though, as will appear from the quotations hereinafter made, Sec. 262 does not authorize such a separate suit except in aid of pending litigation.

Though the Circuit Court of Appeals is in general a court of purely appellate jurisdiction, it is

evident that in the issue of extraordinary writs it has in some cases a purely original jurisdiction. Thus a writ of mandamus may be issued to protect a future possible right of appeal to the Appellate Court.

McClellan vs. Carland, 217 U. S., 268.

The petition for the issue of such a writ is certainly an original proceeding. And even though appellate proceedings be pending in the Circuit Court of Appeals so that the application for an extraordinary writ may be called an ancillary proceeding, an ancillary proceeding is none the less a separate and, therefore, original action.

See In re Williams, 123 Fed. Rep., 321, 322.

The second line of argument suggested is equally unsound.

The Supreme Court has several times decided that the extraordinary writs cannot be used to obtain an appellate jurisdiction which could not be otherwise obtained.

In McClung vs. Silliman, 6 Wheat., 598, 601 (mandamus), it is said:

> "The fourteenth section of the act now under consideration" (Act, September 24, 1789, c. 20, 1 Stat., 81; now Sec. 716, Revised Statutes U. S. Comp. St., 1901, page 580), "could only have been intended to vest the power * * * in cases where the jurisdiction already exists, and not where it is to be created or acquired by means of the writ proposed to be sued out."

And in Bath County vs. Amy, 13 Wall., 244, 249, the Supreme Court said (mandamus):

> "The writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

And in In re Commonwealth of Massachusetts, 197 U. S., 482, 488 (prohibition), the court says:

> "By Sec. 688, prohibition may issue 'in the district courts, when proceeding as courts of admiralty and maritime jurisdiction,' but there is no similar provision in respect of other courts. And it has been repeatedly held, as to the Circuit Courts, that they have no power under Sec. 716 to issue writs of prohibition and mandamus, except when necessary in the exercise of their existing jurisdiction. Bath County vs. Amy, 13 Wall., 244, 248; McClung vs. Silliman, 6 Wheat., 598, 601.
>
> This is equally true of this court, that is to say; that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto."

Covington Bridge Co. vs. Hager, 203 U. S., 109, 110 (mandamus):

> "It has been too frequently decided in this court to require the citation of the cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid

> of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process."

And as conclusive that Sec. 262 did not intend to confer appellate jurisdiction upon the Circuit Court of Appeals by way of an extraordinary remedy, we have the appellate jurisdiction of that court distinctly set forth in Sec. 128 of the Judicial Code:

> "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error, final decisions in the district courts," etc.

Here we have the code distinctly limiting the appellate jurisdiction of the Circuit Court of Appeals to a review by appeal or writ of error of final decisions.

The granting of a new trial is not a final decision.

Sec. 262 therefore confers upon the Circuit Court of Appeals an *original* jurisdiction to issue the writ of prohibition in certain cases. In other words, wherever the Circuit Court of Appeals will have jurisdiction in any case, if either party litigant shall bring the cause before that court by writ of error or appeal, a party litigant shall have the right to institute an independent action in the Circuit Court of Appeals in order to prevent either his opponent or the District Court from doing something which may prevent the Circuit Court of Appeals from giving him that practical relief to which he may ultimately show himself to be entitled therein.

Now, we must remember that whether extraordinary relief of this sort were sought in equity by way of injunction or whether it were sought at law by way of mandamus or prohibition, and whether it were in a civil or a criminal case, it was a *civil* remedy, a *new action*, resting in the original jurisdiction of the court to which the application was made.

And we have Sec. 236 of the Code giving the Supreme Court appellate jurisdiction "in the cases hereinafter specially provided for." And then we have that appellate jurisdiction specially provided for in Secs. 237-252; and we find that its appellate jurisdiction can only be invoked by appeal, writ of error and in some instances by certiorari and certification of questions from the Circuit Court of Appeals.

It is apparent that Congress has never intended to change the common law nature of an application for a writ of prohibition.

Sec. 239 is intended simply to give the Supreme Court a method of final review of questions coming within the appellate jurisdiction of the Circuit Court of Appeals, where the rights of the parties depend on very doubtful questions of law. For this reason Sec. 239 gives the Supreme Court power to order the whole record sent up for its consideration. Now, could the Supreme Court do that in this case? If the application for the writ of prohibition is merely a step in the case of U. S. vs. Albert Freeman, then this court would have to have sent up to it the record in the case of Freeman, plaintiff-in-error, against the United States, defendant-in-error, and would have before it for its consideration all the questions raised by that writ

of error before the Circuit Court of Appeals. That case would thereby be removed from the Circuit Court of Appeals to the Supreme Court although it has not yet been argued before the former court, nor considered in any way by it; nor has that court ever expressed a desire to have the Supreme Court pass upon any of the questions therein.

If all that should be sent up under Sec. 239 would be the whole record upon the petition for the writ of prohibition, then it follows that it is an entirely separate proceeding and a matter of original jurisdiction with the Circuit Court of Appeals, and there would be no authority in Sec. 239 for the Supreme Court to consider that record or to make any disposition of it.

Yet Sec. 239 distinctly provides that wherever the Supreme Court has power to pass upon questions certified to the Circuit Court of Appeals, it may order the whole record sent up and decide the whole matter. We submit that the very fact that the Supreme Court would not have power to do that in this instance shows the futility of any claim that the questions here certified are the kind of questions permitted by Sec. 239.

III.

In any event, whatever views this Court may entertain on the question whether the issue of the writ of prohibition is the exercise of an appellate or an original jurisdiction, it is certainly true that these questions have not arisen in any case within the appellate jurisdiction of the Circuit Court of Appeals "*as defined in Sec.* 128," which is necessary in order that this Court may have authority to answer them under Sec. 239.

Notice that under Sec. 128 the appellate jurisdiction of the Circuit Court of Appeals is confined "to review by appeal or writ of error final decisions of the District Court."

IV.

The questions submitted do not appear to be of such nature as to call upon this Court to answer them.

It appears to have been established at an early day and to have remained the law ever since:

(1) That the whole case cannot be sent to this Court by certificate of division of opinion.

(2) Nor can this defect be avoided by submitting the whole case in the form of separate questions.

(3) Nor does it make any difference if the decision of the whole case turns upon matters of law only.

(4) Nor will this Court answer abstract, hypothetical or moot questions.

(5) And if an answer to one of the questions certified disposes of the case, this Court will not answer the other questions.

U. S. vs. Bailey, 9 Peters, 267;
Adams vs. Jones, 12 Peters, 207;
White vs. Turk, 12 Peters, 238;
Webster vs. Cooper, 10 How., 54;
Havemeyer vs. Ia. Co., 3 Wall., 294;
U. S. vs. Buzzo, 18 Wall., 125;
U. S. vs. Britton, 108 U. S., 199, 207.

Jewell vs. Knight, 123 U. S., 426, 433;
U. S. vs. Hall, 131 U. S. 50, 52.
Warner vs New Orleans, 167 U. S., 467;
Cross vs. Evans, 167 U. S., 60;
Emsheimer v New Orleans, 186 U. S., 33;
C. B. & Q. Ry. Co. vs. Williams, 205 U. S., 444;
The Folmina, 212 U. S., 354;
C. B. & Q. Ry. Co. vs. Williams, 214 U. S., 492;

Does it not appear here that the whole case before the Circuit Court of Appeals has been sent up by certifying every question of law presenting itself to that court in the case? Is not this in effect, a request by the Circuit Court of Appeals to this Court to tell that court how to decide the cause now pending before it?

U. S. vs. Hall, 131 U. S., 50, 52:

> "They seem eminently liable to the objection that they are designed to split up the case before the court into fragments, upon which, before a trial or decision by that court, it is intended to obtain the opinion of this court."

Jewell vs. Knight, 123 U. S., 426, 433 (repeated in C. B. & Q. Ry. Co. vs. Williams, 205 U. S., 444, 452):

> "The whole case, even when its decision turns upon matters of law, cannot be sent up by certificate of division."

Then are not some of the questions purely hypothetical and not such as are really before the Circuit Court of Appeals for its decision, and not necessary to its decision?

Question I-B, wherein this court is requested to advise the Circuit Court of Appeals whether this court has sole jurisdiction to issue the writ of prohibition under the facts stated, seems essentially hypothetical. How can the jurisdiction of the Circuit Court of Appeals to issue the writ of prohibition petitioned for, depend in any way on the question whether the Supreme Court has sole jurisdiction or even whether it has any jurisdiction? Suppose the Supreme Court has no jurisdiction to issue the writ. How will that help in any way to determine whether the Circuit Court of Appeals has jurisdiction? There is no statute making the jurisdiction of the Circuit Court of Appeals dependent upon the jurisdiction or lack of jurisdiction in the Supreme Court. Either the statute has conferred jurisdiction upon the Circuit Court of Appeals or it has not done so; and on the affirmative or negative of that proposition, the jurisdiction of the Supreme Court, exclusive or concurrent, can have no bearing. Furthermore, the question of the jurisdiction of the Supreme Court in the matter is not before the Circuit Court of Appeals; nor can the question possibly be necessary to a decision of the case by that court.

Question I-A, in its present form, seems also to be hypothetical because it omits an essential fact, to wit, the consent of the government to Judge Mayer's jurisdiction. As we endeavor to show hereinafter (infra, page 41) the consent of the government to Judge Mayer's jurisdiction deprives the Circuit Court of Appeals of any jurisdiction to issue this writ, even if it would have had such jurisdiction otherwise. This essential fact is

omitted from the question and so Question I-A, is not a question, the decision of which is necessary to the decision of the case. Question I-A might be answered in the affirmative; and the Circuit Court of Appeals would still have to face the question whether it had jurisdiction upon the facts outlined in Question I-A, *with the additional fact of the government's consent.*

Question II also seems to be hypothetical because it does not include the fact that the government consented. We shall endeavor to show hereinafter (infra, pp. 118, 128) that this fact is very material on the question of the jurisdiction of Judge Mayer. And so even if Question II, as it stands should be decided in the affirmative, the Circuit Court of Appeals would still have to face the question whether the District Court had jurisdiction *in view of the government's consent.* A decision of Question II, therefore is not necessary to a decision of the case by the Circuit Court of Appeals.

Question III, seems also to be hypothetical. The question before the Circuit Court of Appeals is whether the government, by its consent, has barred itself *from procuring the writ of prohibition.* The question which that court has certified, however, is whether the government has barred itself from questioning Judge Mayer's jurisdiction. Now, the question whether the government is now entitled to any other kind of relief than prohibition is not before the Circuit Court of Appeals.

The status of this case in this Court, therefore, appears to be as follows:

That the Circuit Court of Appeals has certified to this court for decision the *whole* case, having cut it up into several questions, all of which are *hypothetical*, in a matter not arising within its *appellate* jurisdiction.

In Webster vs. Cooper, 10 How., 54, Taney, C. J., calling attention to the fact that the whole case had been divided into points and sent up to the Supreme Court, and that several of the latter points could not have arisen until the previous ones were first decided, said:

> "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other."

In justice to the learned judges of the Circuit Court of Appeals, we desire to say that these objections to the sufficiency of the questions were not raised before that court. They first occurred to respondent's counsel during the preparation of this brief. Nevertheless, the authorities indicate that these defects are jurisdictional; and so we deem it our duty to call this court's attention to them.

CONSIDERATION OF QUESTION I-A.

> *"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court and thereafter, upon a motion made in the District Court after the expiration of the term at which the judgment was entered, said District Court has indicated its intention to enter an order vacating the judgment and ordering a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial, has the Circuit Court of Appeals jurisdiction to issue a writ of prohibition against the entry of such order by the District Court, when, in the opinion of the Circuit Court of Appeals, the District Court is without jurisdiction to enter such order?"*

We call the Court's attention (page 17, supra) to the fact that Question I-A seems to be hypothetical because it omits the fact of the government's consent. We will here, however, discuss the question of the jurisdiction of the Circuit Court of Appeals in both aspects of the question, and submit that even if the government had not consented, and *a fortiori* since it did consent, that court has not jurisdiction to issue the writ.

I.

No writ of error lies in favor of the Government in a criminal case.

U. S. vs. Sanges, 144 U. S., 310.
U. S. vs. Zarafonitis, 150 Fed., 97.

U. S. vs. Ball, 163 U. S., 662, 670.
Kepner vs. U. S., 195 U. S., 100, 130.

It is not necessary for the purposes of this case to consider whether U. S. vs. Sanges decided that the government has no writ of error in a criminal case or whether it merely decided that the Supreme Court has no jurisdiction to review a criminal case by writ of error. Nor is it necessary to consider the soundness of the doctrine therein argued that the government has no writ of error in a criminal case. If the right to a writ of error exists in the government, then it has another remedy in this case; and pursuant to the well recognized rule in such matters, it is not entitled to the writ of prohibition because the issue of the writ would not be necessary to the exercise of the appellate jurisdiction of the Circuit Court of Appeals. But the doctrine advanced in that case seems to have been accepted as the rule in the Federal Courts (See U. S. vs. Dickinson, 213 U. S., at page 99). We therefore are basing this argument upon the proposition that in the Federal Courts the government has no right to a writ of error in a criminal case.

II.

Sec. 262 of the Federal Code does not confer an appellate jurisdiction which the Circuit Court of Appeals would not have without it.

In other words, Sec. 262 is not intended to give the Circuit Court of Appeals power to use

extraordinary writs as a means of exercising appellate review in cases where appellate jurisdiction cannot be otherwise obtained. It appears to be well settled that the power of that court to use the extraordinary writs is confined to their use as ancillary remedies in cases where appellate jurisdiction already exists.

> McClung vs. Silliman, 6 Wheat., 598, 600.
> Bath County vs. Amy, 13 Wall., 244, 249.
> Cov. Bridge Co. vs. Hager, 203 U. S., 109, 110.
> Re Massachusetts, 197 U. S., 482, 488.

Sec. 262, is merely a re-enactment of previous statutes construed in the above cases. In McClung vs. Silliman, *supra*, the court says (page 601):

> "The fourteenth section of the Act now under consideration" (Act Sept. 24, 1789, c. 20, 1 Stat., 81, now Sec. 716, Revised Statutes U. S., Comp. St., 1901, page 580), "could only have been intended to vest the power * * * in cases where the jurisdiction already exists, and not where it is to be created or acquired by means of the writ proposed to be sued out."

And in Bath County vs. Amy, 13 Wall., at page 244, the court said:

> "The writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

And as the appellate jurisdiction of the Circuit Court of Appeals is set forth in Sec. 128, it fol-

lows that the Circuit Court of Appeals has no jurisdiction to issue the writ of prohibition herein unless the issue of that writ is necessary to the exercise of some appellate jurisdiction which it already has by virtue of the writ of error.

III.

Meaning of "necessary for exercise of jurisdiction."

The question then arises as to the construction of the words, "necessary for the exercise of jurisdiction" within the meaning of Sec. 262.

Two views have been set forth:

(1) That it means that the Circuit Court has no power to issue the writ unless an appeal or writ of error has already been brought before it in the main case concerning which the writ of prohibition is sought.

> Cov. Bridge Co. vs. Hager, 203 U. S., 109.
> Ex parte Warmouth, 17 Wall., 64.
> U. S. vs. Williams, 67 Fed., 384.
> In re Paquet, 114 Fed., 437.
> Zell vs. Judges, etc., 149 Fed., 86.

In none of these cases is the question thoroughly discussed; nor does any one of them attempt to define *all* the elements necessary to constitute the exercise of jurisdiction. Each of the above cases simply says that *one* necessary element is that the appeal or writ of error must be brought before the writ is petitioned. *But not one of them pre-*

tends to say that this is all that is necessary, or to set forth all that is necessary.

(2) The U. S. Circuit Court of Appeals for the Eighth Circuit in Barber Asphalt Paving Co. vs. Morris (132 Fed., 945), held that the power of the Circuit Court of Appeals to issue mandamus, if confined to a time after the invocation of its appellate jurisdiction, would in many cases fail of its purpose. The court, therefore, in construing the statute said that the true test of appellate jurisdiction in the exercise of which mandamus could issue was the *existence* of the jurisdiction and not its prior invocation. The court said that "jurisdiction" meant the right of the Circuit Court of Appeals to review a case if the case could thereafter be brought before it by writ of error or appeal; and that the moment an action is commenced appellate jurisdiction over it exists.

This same view was adopted by this court in McClellan vs. Carland, 217 U. S., 268, when it held that the Circuit Court of Appeals had power to issue mandamus even before a writ of error or appeal had been sued out in the Circuit Court of Appeals. In that case the court noticed that in order to grant a writ of mandamus it was necessary to depart from any idea that that writ could only be issued after the writ of error should be sued out.

We have, therefore, a line of decisions distinctly holding that the Circuit Court of Appeals cannot issue prohibition until after the writ of error or appeal has been sued out. And we have two decisions holding that the Circuit Court of Appeals may, however, issue the writ of mandamus before

a writ of error or appeal has been sued out. And then we have Ex parte United States, 226 U. S., 420, where this court issued the writ of prohibition, after it had adjudicated upon the writ of error or appeal and had issued its mandate thereupon, in order to prevent the District Court from doing something in violation of that mandate.

Now the definition of "jurisdiction" and "exercise of jurisdiction" as used in Sec. 262 must be the same whether it be applied to the writ of mandamus or the writ of prohibition, and in all cases of either. And these decisions are irreconcilable unless it appears *that the circumstances which may make the writ of prohibition necessary for the exercise of the court's jurisdiction are not necessarily the same as the circumstances which may make the writ of mandamus necessary for the exercise of the court's jurisdiction.*

And it becomes proper, therefore, to consider what is the meaning of "jurisdiction" and "exercise of jurisdiction" and "necessary for the exercise of jurisdiction" within the meaning of Sec. 262.

We must remember that "jurisdiction" may have two distinct meanings:

1. First the word is used to describe certain classes or kinds of cases or litigation in which the court will have power to give relief if and when that power is invoked.

2. But "jurisdiction" is also frequently used in the sense that the power of the court has actually been invoked by an applicant for relief. This is a use of the word "jurisdiction" in the concrete if we may so term it. When a writ of error has been sued out, then we say that the Circuit Court of Appeals has obtained jurisdiction of that case.

But in whichever sense the word is used, the court's jurisdiction is not confined merely to adjudication. Jurisdiction is the power both to adjudicate the rights of the parties and to enforce those rights. And we shall endeavor herein to show that in the phrase "necessary for the exercise of jurisdiction" the word "jurisdiction" means the power in any concrete case to give relief to some party entitled to seek relief from that court.

Jurisdiction conferred on a court is not a privilege but a duty. The Circuit Court of Appeals is given the power to hear and determine certain appeals and writs of error, not simply that it may have the pleasure of doing so, *but that it may grant a litigant the relief to which he is entitled*, the hearing and judgment on the appeal being merely the means used to determine what relief shall be extended. Jurisdiction is not the power to *hear*, but the power to *give relief*. And perhaps this idea was in the minds of the learned judges in McClellan vs. Carland and Barber &c. Co. vs. Morris—that the power given courts to issue writs when necessary for the exercise of their jurisdiction was not given them merely that they might please themselves in the way of hearing an appeal or writ of error, but that it was given them in order that they might be able to grant relief to a party entitled to it—that they were exercising their jurisdiction when they were doing *that*—and that an extraordinary writ was only necessary for the exercise of their jurisdiction when its issue became necessary in order that the court might not be deprived of its power to give proper relief to some one properly before it asking that relief. This we submit is the true test of "exercise of its jurisdiction" by a court. All the writs used by

the District Courts are used in the exercise of their jurisdiction. And as showing that exercise of jurisdiction does not merely mean the right to hear and determine a cause then pending before it, we notice that the District Court can issue writs both before the beginning of an action and after its determination, e. g., summons and execution. This is true whether or not the power to issue these writs is derived from Sec. 262. No difference whence comes the power, the issue of such writs is an exercise of jurisdiction. And we again call the court's attention to Ex parte United States, 226 U. S., 420, in which the writ was issued after the Supreme Court had issued its mandate on the writ of error or appeal.

Let us consider some possible cases:

(1) Suppose the convict gets his decision for a new trial after expiration of the term but before he sues out his writ of error and before his time to do so expires. Evidently no one would sue out the writ. The government could not and the convict would not. If the sole test of the power to issue the writ of prohibition is the pendency of the cause in the Circuit Court of Appeals by the writ of error, then jurisdiction to issue the writ would not lie.

(2) Suppose he himself becomes fearful of the jurisdiction of the trial court to grant the new trial under these circumstances, and in order to preserve his rights, sues out his writ of error before the order granting the new trial is entered. Would this act on the part of the plaintiff-in-error change the rights of the government and the power of the Circuit Court of Appeals to issue the writ?

If so, all he would have to do to defeat it would be to have his order entered and then sue out his writ of error.

(3) Suppose he lets his time to sue out his writ of error expire, and then moves for a new trial, which is granted. Would both the government and the Circuit Court of Appeals be helpless simply because no writ of error had been issued?

(4) Suppose he withdraws his writ of error and then makes his motion. Would he not be in the same position?

It makes no difference whether we say that the invocation of the writ of error, or the mere power of the court to hear it when invoked, be the rule, so long as we say that these mere incidents themselves create the jurisdiction of the court under Sec. 262, we have in these very supposable cases instances where the defendant has it within his power to fix the rights of the government and the powers of the Circuit Court of Appeals. Is the jurisdiction of the Circuit Court of Appeals to be made and unmade at will by a convict jockeying for position?

We submit that the true rule, and the only workable one is the following, to wit:

The Circuit Court of Appeals has jurisdiction to issue an extraordinary writ when thereby it can remedy a wrong done by one litigant or prevent a wrong proposed by him, which will prevent the other litigant from procuring the benefits of relief which he seeks from the Circuit Court of Appeals through its appellate jurisdiction.

Courts of law exist, not merely for the purpose of laying down abstract rules of law, but to give litigants the relief to which they are entitled. Hence, the jurisdiction of a court is not confined to its power to make orders or render judgments, for that would be nothing more than the power to make rules of law. And since courts exist for the purpose of giving relief to those seeking it, their jurisdiction must include everything necessary to give *practical* relief—from bringing the parties into court down to and including the enforcement of orders and judgments. E. g., the jurisdiction of the District Court includes the power to issue a summons, to try the cause, to render judgment, to enforce its judgment by execution, to enforce its orders by punishment for contempt, etc. And it is only when we consider the word "jurisdiction" in this light that we arrive at the true construction of Sec. 262. In order to confer upon the several courts the power to administer justice, it is necessary to give them both the power to adjudge the rights of the litigants and the power to enforce those rights. Now those rights are enforced by writs. And so we have the code first prescribing the several matters over which the several courts have power of adjudication. That is one part of their jurisdiction. And then we have Sec. 262 conferring upon them the power to issue the writs that are necessary to enable them to "exercise their jurisdiction," i. e., to give to the several litigants the relief to which they are entitled. That is the rest of their jurisdiction. Therefore, the issue of a writ only becomes necessary for the exercise of a court's jurisdiction, when that writ is needed in order to enable that court to enforce the proper relief to a litigant entitled thereto. The

test is not whether the cause is then pending in that court; nor is it whether the cause may thereafter be brought to that court. But the true test must be this question: *"Is the writ necessary to enable this court to give the petitioner some relief which he is entitled to seek from this court?"*

Now the facts or circumstances which make the writ of mandamus necessary for the exercise of the court's jurisdiction may well differ from the facts or circumstances which will make the issue of prohibition necessary to the exercise of its jurisdiction. Possibly the fact that a writ of error has or has not been brought may be important in deciding the question whether the petitioner's legal rights are being invaded in an application for prohibition, and possibly that fact might not be of consequence in an application for mandamus; *but that is a matter for the court to consider in each particular case in determining the question whether the petitioner's legal rights are being invaded in that case.* It is not, however, a matter of moment in considering the words "necessary for the exercise of jurisdiction" within the meaning of Sec. 262.

And so we submit that the jurisdiction of the Circuit Court of Appeals to issue the writ of prohibition herein petitioned, depends on the question whether the writ is necessary to enable the Circuit Court of Appeals to enforce some legal right of the government to relief under the writ of error.

Before completing our argument on the question whether the Circuit Court of Appeals has jurisdiction to issue the writ of prohibition herein, we desire to make the following

Answer to Government's Brief on this Point.

(a)

We do not think it worth while to answer the argument on pages 3, 4 of the government's brief, to the effect that the issue of the writ of error transferred to the Circuit Court of Appeals jurisdiction of Freeman's case in so far as it was contained in the record of the previous trial. For the purposes of this brief it makes no difference whether the want of the bill of exceptions affects jurisdiction of the Circuit Court of Appeals. Our argument remains the same in either event.

(b)

At the top of page 5 of its brief, the government says that the Circuit Court of Appeals "is entitled to protect itself;" and its whole argument on "jurisdiction" and "exercise of jurisdiction" is to the effect that the power given the Circuit Court of Appeals to hear and determine the appeal or writ of error is a *privilege* and that the judges of the Circuit Court of Appeals should be permitted to amuse themselves or please themselves by hearing the argument and determining the appeal or writ of error. And in support of that idea of "jurisdiction," the brief purports to quote Rhode Island vs. Massachusetts (12 Pet., 657): "the power to hear and determine the subject matter in controversy." What Justice Baldwin really said in that case was as follows (page 718):

> "* * * and this case is now before us for consideration, upon a motion by the defend-

ant, to dismiss the bill for want of jurisdiction of the cause.

However late this objection has been made, or may be made in any cause, in an inferior or appellate court of the United States, it must be considered and decided before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them."

If this language of the court was intended merely to mean that jurisdiction to determine a cause is a privilege granted to the justices of that court for their own gratification or amusement, then, of course, the exercise of its jurisdiction by the court would be a protection of *itself*. But we again submit as hereinbefore, that the jurisdiction granted to a court is the power to grant relief, and that when a court exercises its jurisdiction it does not do so for the purpose of protecting itself, but to protect *a litigant entitled to relief from it*.

As we said before, undoubtedly the difficulty concerning the meaning of "jurisdiction" and "exercise of jurisdiction" arises in part at least from the fact that the word "jurisdiction" has two distinct meanings.

1. The word is used to describe certain classes or kinds of cases or litigation in which the court will have power to give relief if and when that power is invoked.

> 2. But "jurisdiction" is also frequently used in the sense that the power of the court has actually been invoked by an applicant for relief. This is a use of the word "jurisdiction" in the concrete if we may so term it. When a writ of eror has been sued out, then we say that the Circuit Court of Appeals has obtained jurisdiction of that case.

But the court's jurisdiction is not confined merely to an adjudication. Jurisdiction is the power both to adjudicate the rights of the parties and to enforce those rights. This is evidently what Baldwin, J., had in mind in Rhode Island vs. Massachusetts, for note that he says "it is the power * * * to adjudicate or exercise any judicial power over them."

Now the government's contention evidently is that the Circuit Court of Appeals, having had conferred on it the *privilege* of deciding an issue at law, can insist upon the right to decide that issue irrespective of the question whether its failure to do so will impede the legal right of any person entitled to seek relief from it. Whereas, as we have shown heretofore, jurisdiction is a power conferred on the court to give relief. It is not its *privilege* to give that relief but its *duty* to do so. It does this not for its *own* protection but to protect the *applicant for relief*. It is exercising its jurisdiction when it is giving relief to an applicant lawfully entitled to relief from it. And therefore its jurisdiction is not invaded in any unlawful manner unless it is being prevented from giving relief to some party lawfully entitled thereto.

(c)

At page 6 of the government's brief the Solicitor General argues that a writ of prohibition is the appropriate remedy to prevent an interference with the jurisdiction of the Circuit Court of Appeals; and he cites various cases from the State courts to show that at common law prohibition was a proper remedy to prevent a trial court from granting a new trial in excess of jurisdiction. We do not think it worth while to reply to any of these authorities. We are willing to admit that at common law prohibition was an appropriate remedy to prevent a trial court from granting a new trial in excess of its jurisdiction *provided* there was no other remedy; but we must remember that we are dealing here, not with the question of the *appropriateness* of the remedy, *but with the question of the power of the Circuit Court of Appeals to grant the remedy;* and in that respect we must remember that the power of the court is limited by Sec. 262.

Returning now to our argument that the Circuit Court of Appeals has no jurisdiction to grant the writ of prohibition herein,

IV.

The Government has no legal right to any relief under the writ of error.

It may be argued that under the very construction of Sec. 262 herein advocated, the Circuit Court of Appeals has power to issue the writ be-

cause the government is being deprived of relief to which it is entitled, to wit, the right to have the writ of error heard and the judgment affirmed.

The answer to that is that a defendant never seeks relief. He is merely in the position of opposing the award of relief to plaintiff; so that any act done by *plaintiff*, which will take away *plaintiff's* right to relief, cannot prejudice *defendant*. Suppose plaintiff-in-error should withdraw his writ of error. Can the government complain? It makes no difference how the right of plaintiff-in-error to have his writ of error heard is taken away, the government cannot complain for it is not damaged thereby. It is in no worse position than it would be if the writ of error should be heard and a new trial granted thereon. It is in no worse position than it would be if the writ of error were first withdrawn and then a new trial granted on this motion. In other words, the mere possibility that the Circuit Court of Appeals might affirm the judgment upon the writ of error is not a right of the government's which is being invaded or for the deprivation of which it can complain. How can the government be said to have a legal right to have the writ of error decided, when the plaintiff-in-error can withdraw it?

Latham vs. U. S., 9 Wall., 145.
U. S. vs. Minn. etc. Co., 18 How., 241.
U. S. vs. Young, 94 U. S., 258.

These cases show that the mere right to have a writ of error argued is not in itself a legal right of defendant-in-error; otherwise it could not be withdrawn against his objection. And if it can be taken away by the direct means of withdrawal on motion,

then no rights are invaded if it is taken away indirectly.

It is the plaintiff-in-error who is seeking the relief before the Circuit Court of Appeals, *and he is the only one who can get any relief there.* The question before the Circuit Court of Appeals, upon the writ of error, is not whether the government is entitled to the relief of having the conviction affirmed; but whether plaintiff-in-error is entitled to the relief of having the conviction reversed. That is the jurisdiction that is being exercised by the Circuit Court of Appeals—the power to grant relief to the person seeking it. And, therefore, it has no jurisdiction to issue the writ of prohibition upon the petition of the government because the issue of the writ is not necessary to enable the court to give the government any relief which it may now be seeking or can at any time seek—*because it cannot be a petitioner for appellate relief.*

V.

The Government cannot question the District Court's jurisdiction.

If the question be asked: How then can the government test the district court's jurisdiction to grant this new trial, we answer that it cannot do so. In view of the fact that it is not entitled to any appellate relief in a criminal cause, it must submit to the new trial. If the defendant is acquitted the government is helpless. If he is convicted then it becomes a question whether *he* can question the validity of his second conviction. And

this brings us face to face with the proposition that the government is putting before this court, to wit: *It is trying to have this court decide a question that the government can never raise.* So that the sum and substance of the government's petition for a writ of prohibition is nothing more than an attempt to get from this court or the Circuit Court of Appeals, private advice. It is in effect, saying to the court: "Let us know now— When Freeman is tried again, *if* he is convicted, and *if* he raises the question of jurisdiction, will you reverse the conviction upon *his* writ of error." And on this point we would refer to the remarks of this court in U. S. vs. Perrin, 131 U. S., 55, at foot of page 57:

> "It is sufficient to say that the system of criminal law of the United States does not contemplate a general right of appeal from the courts trying criminals to this court; it does not intend that in all cases before the trial is had the instructions of this court, concerning matters which may come in issue, shall be delivered as a guide to the court that is to try the cause."

No analogy can be drawn from civil cases because they rest on a different basis, to wit, the right of both parties to review by appeal or writ of error. While defendant-in-error in a civil case could not procure a writ of prohibition under similar circumstances, i. e., while the Circuit Court of Appeals would have no more jurisdiction to grant the writ in a civil case under similar circumstances; yet the defendant-in-error always has his remedy under Sec. 238 or otherwise.

McLish vs. Roff, 141 U. S., 661, at page 668;
U. S. vs. Jahn, 155 U. S., 109;
Mexican Central Ry. Co. vs. Eckman, 187 U. S., 429, 432;
Re Huguley Mfg. Co., 184 U. S., 297, 302;
Nelson vs. Meehan, 155 Fed., 1, 3;
Manning vs. German Life Ins. Co., 107 Fed., 52.

In Freeman's case the government is remediless, not because of any difference in the jurisdiction of the Circuit Court of Appeals in civil and criminal cases under Sec. 262, but simply because the government has no right of error or appeal in a criminal case. This makes it still more apparent that the government is merely trying by this petition to have this court decide before trial a question which the government can never raise in the case. McClung vs. Silliman, 6 Weat., 598, at page 603, per Johnson, J.:

> "It is not the first time that this court has encountered similar difficulties in its advance to questions brought up to it from other tribunals. It has avoided them by deciding that it is not bound to encounter phantoms. The party who proposes to avail himself of a defective jurisdiction has nothing to complain of if he is left to take the consequences. His antagonist might have had cause to complain—he can have none."

VI.

Application of Sec. 262 to the Circuit Court of Appeals.

The question may now be asked: In what cases then can the Circuit Court of Appeals issue an extraordinary writ? Can we give instances of cases where rights to relief in the appellate jurisdiction of the Circuit Court of Appeals are threatened to be impeded by some act which will give the Circuit Court of Appeals jurisdiction to issue such a writ? Undoubtedly mandamus would lie from the Circuit Court of Appeals at the instance of plaintiff-in-error to compel a district judge to settle a bill of exceptions; or to obey the mandate of the appellate court *even after the case is ended.* Possibly the following would be a case where prohibition would lie: Suppose plaintiff-in-error is relying largely upon certain assignments of error relating to an exhibit in the office of the clerk. Suppose the District Judge, either upon motion by the clerk or by the government, decides that he will make an ultra jurisdictional order directing the destruction of that exhibit. It would seem there as if the Circuit Court of Appeals could prohibit the District Judge from entering such order upon a showing that the destruction of that exhibit would prevent the court from granting the plaintiff-in-error the relief to which he was entitled.

However, it makes no difference whether it is possible to suppose a case where the Circuit Court of Appeals could issue the writ of prohibition at the instance of a plaintiff-in-error. If no such circumstances could arise it would simply show

that the issue of the writ of prohibition is not necessary to the exercise of its jurisdiction by the Circuit Court of Appeals. Even that state of affairs does not render the statute useless nor litigants helpless. We must bear the following things in mind:

(1) That the statute refers to *all* the writs and *all* the courts and *all kinds of cases*. And Congress cannot be said to have had any particular writ or any particular court or any particular kind of case in mind. And especially it cannot be said that Congress must be presumed to have had the issue of the writ of prohibition by the Circuit Court of Appeals especially in mind. All that can be presumed is that Congress intended to give each court the power to issue any writs that might be necessary to enable it to perform the duties imposed upon it by the statute creating its jurisdiction. And it does not follow, therefore, that it was intended that any one court should have power to issue all the writs. If "jurisdiction" means the power to give relief, then Sec., 262 becomes plain. It simply confers on the courts the power to issue such writs as may be necessary to enable them to give that practical relief which the code says they can give.

(2) And we must remember that prohibition is the remedy of last resort. It can not be used if there is any other remedy. And, naturally, being the remedy which can only be resorted to if there is no other, it is the remedy coming within the most limited use.

(3) We must further remember that the judicial code fully provides for the protection of all the rights of all parties in so far as it is the intention of the law that they should have relief. It pro-

tects civil litigants, who have other remedies by reason of the fact that they have the right of review by writ of error or appeal; and the only reason those remedies cannot be invoked by the government is because it was never intended that the governement should have the right of review in a criminal case. *There is, therefore, no hardship upon the government except the hardship of inability to review. And since that is the policy of the law, a false construction should not be placed upon the statute merely to give the government the right to obtain by this extraordinary and indirect method, that which it cannot get directly and which the law intends that it shall not have.*

VII.

The consent given in Exhibit A by the United States Attorney deprived the Circuit Court of Appeals of any jurisdiction to issue the writ of prohibition, even if it would otherwise have had any.

The reasons or motives of the United States Attorney for consenting to have Judge Mayer decide the motion on its merits are of no importance—*so long as he knew that he was consenting and what he was consenting to.* He is bound by his act to whatever extent he could possibly be bound, because he knew what he was doing; and he cannot be relieved from its consequences by showing that he had some ulterior motive. His consent, therefore, is not affected by the excuse that

he desired to have the court pronounce the truth concerning the conduct of an assistant United States Attorney. His consent and request to have Judge Mayer hear the motion on its merits is an agreement to abide by the decision, i. e., an agreement that he will not thereafter question Judge Mayer's jurisdiction. Especially is this so *because of the reasons given by the United States Attorney.* Unless Judge Mayer had jurisdiction to grant a new trial he had no jurisdiction, upon such a motion, to determine the guilt or innocence of the charges made against the United States Attorney's office. Without jurisdiction to grant the new trial, anything that he would say on the latter question would be mere expression of a personal opinion; for the only way by which he could decide upon the conduct of the District Attorney's assistant would be by a decision of the motion.

Now, at the time he gave his consent in Exhibit A, did the United States Attorney say to himself: "I will waive the question of the District Court's jurisdiction so as to let the court pass upon the question of the conduct of the United States Attorney's office. If he denies the motion—well and good. If he grants it, I will then claim that he had no jurisdiction?" We do not believe that he would be guilty of this sort of trickery toward the District Court; nor do we believe that any one capable of such an act would be permitted to avail himself of it. This court must rather assume that at the time the United States Attorney gave his consent in Exhibit A, he intended (in so far as he was able) to give Judge Mayer the power to decide the motion; that he intended to bind the government to abide by the decision; and that he

intended to bind the government to all things necessary to enable Judge Mayer to have jurisdiction to make a binding order in the premises; and that subsequent to Judge Mayer's decision the U. S. Attorney changed his mind, and for some reason has felt called upon to raise the question of Judge Mayer's jurisdiction. It can make no difference what were the motives or reasons inducing the consent in Exhibit A, the government is fully bound by it in all its consequences; and whatever powers were given to Judge Mayer thereby or were taken away from the Circuit Court of Appeals thereby, were so given and taken away at least as fully as if Exhibit A contained no reasons whatever for the consent.

We submit that the consent of the United States Attorney prevented the Circuit Court of Appeals from obtaining any jurisdiction to issue the writ of prohibition herein, even if such jurisdiction might otherwise have existed *because the government's consent to the jurisdiction of the District Court included its consent to the discontinuance of the writ of error in the Circuit Court of Appeals if the District Court should grant the new trial.*

We do not hereby waive our contention hereinabove made that the government has no legal right to have the writ of error decided if plaintiff-in-error applies to withdraw it. But we now claim that the government's consent to the jurisdiction of Judge Mayer to decide the motion for a new trial on its merits necessarily included an agreement on the part of the government to consent to a withdrawal of the writ of error if Judge Mayer should grant the motion. In considering this

point we are confronted by the question; "Will the entry of the order granting a new trial cause the writ of error to drop?"

(a) If "No," then the consent given in Exhibit A must be held to include an agreement to consent to a withdrawal of the writ of error.

(b) If "Yes" then Exhibit A must be held to include that also.

In either event such an agreement must be presumed, because a consent to Judge Mayer's jurisdiction to decide the motion must include a consent to everything and anything to be done by either party necessary to enable Judge Mayer to get jurisdiction and to make an order that is binding. Even if consent could not confer jurisdiction in itself; yet if jurisdiction depends upon the performance of some act to be done thereafter by either party, then a consent to the jurisdiction by the government binds it to consent to that act to be done by either party, whatever it may be, which will give jurisdiction.

If, therefore, the government ever had any legal rights before the Circuit Court of Appeals—if for any reason it could have opposed a withdrawal of the writ of error by plaintiff-in-error, it has lost its rights and has lost all right to opposition to such withdrawal, because it has agreed to do so. It no longer has any standing in the Circuit Court of Appeals on this writ of error. That court, therefore, has no jurisdiction to issue the writ of prohibition herein because it can exercise no appellate jurisdiction on behalf of the government—*for how can a court exercise its jurisdiction when there is no one who can invoke it?*

Conclusion as to Question I-A.

We submit, therefore, that the Circuit Court of Appeals has no power to issue the writ of prohibition herein:

1. Because the petitioner has no right, by this method or any other, to review Judge Mayer's decision; and so has no rights which are being invaded by that decision.

2. Because the petitioner is being deprived of no relief which it is entitled to seek from the Circuit Court of Appeals.

3. Because, by consenting to have Judge Mayer decide the motion on its merits, the government agreed to waive any rights which it could have in the Circuit Court of Appeals.

4. The writ, therefore, is not necessary to enable the Circuit Court of Appeals to give the government any relief which the latter is entitled to receive from it.

CONSIDERATION OF QUESTION I-B.

> *"Or has the Supreme Court of the United States sole jurisdiction to issue such writ of prohibition, under the circumstances above stated."*

We confess ourselves unable to understand the purpose of this question unless it be conjectured that the Circuit Court of Appeals desires for its information in the future, to know just where authority to issue the writ of prohibition does lie. Yet that can hardly be the case because:

(1) The Circuit Court of Appeals must know that this Court would not answer a question certified for that purpose.

(2) An answer, if given, would be mere *obiter*.

The word "sole" in question I-B indicates as assumption on the part of the Circuit Court of Appeals that the Supreme Court would have jurisdiction to issue the writ of prohibition herein; and their concern seems to be whether the Circuit Court of Appeals has concurrent jurisdiction. Now, we must bear in mind that *none* of the following questions are in this case:

(1) Has the Supreme Court *sole* jurisdiction to issue the writ of prohibition at any time?

(2) Has the Supreme Court *concurrent* jurisdiction with any other court to issue the writ of prohibition at any time?

(3) Has the Supreme Court *sole* jurisdiction to issue the writ of prohibition in this case?

(4) Has the Supreme Court *concurrent* jurisdiction with any other court to issue the writ of prohibition in this case?

(5) Has the Circuit Court of Appeals *sole* jurisdiction to issue the writ of prohibition at any time?

(6) Has the Circuit Court of Appeals *concurrent* jurisdiction with the Supreme Court to issue the writ of prohibition at any time?

(7) Has the Circuit Court of Appeals *concurrent* jurisdiction with the Supreme Court to issue the writ of prohibition in this case?

(8) Has the Circuit Court of Appeals *sole* jurisdiction to issue the writ of prohibition in this case?

We submit that *none* of these questions are before the Circuit Court of Appeals in this case—but *another* question, to wit: *Has the Circuit Court of Appeals jurisdiction to issue the writ of prohibition in this case?* And we have nothing to do with the question whether it is sole or concurrent, or whether it would exist under any other circumstances than these now confronting the Circuit Court of Appeals, or whether the Supreme Court has any jurisdiction in the matter.

Question I-B cannot be decided by the Circuit Court of Appeals nor can its determination one way or the other have any bearing upon the decision of Question I-A. Question I-B seems to be purely hypothetical. (See page 17, supra.)

Answer to Government's Brief on this Question.

We deem it necessary to discuss only three of the cases cited by the government in its brief upon this question (page 9, et seq.). The Solicitor General admits that wherever this Court has been petitioned to issue the writ of prohibition, it has held that it can only be issued in aid of its original or appellate jurisdiction. He goes on, however, to argue that in more recent cases the court has gone beyond that and cites some of the decisions of the court on certiorari in support of his argument.

> In re Chetwood, 165 U. S. 443, 462;
> Whitney vs. Dick, 202 U. S., 132, 135;
> McClellan vs. Carland, 217 U. S., 268.

He loses sight of the fact that the circumstances which may make the issue of *certiorari* "necessary for the exercise of its jurisdiction" by the Supreme Court may be very different from the circumstances which may make *prohibition* "necessary for the exercise of its jurisdiction" by the Supreme Court. In other words, while the definition of "necessary for the exercise of jurisdiction" is the same in either event; yet the circumstances which may give the petitioner the right to seek relief in one case may be very different from those which will give him the right to seek relief in the other. And there are too many decisions of this Court bearing upon the issue of the writ of prohibition to make its decisions upon the writ of certiorari controlling as to the writ of prohibition.

In "In re Chetwood" (165 U. S., 443), we have a case where the petitioner for the writ was a

petitioner for appellate relief in the Supreme Court. Here was a plain case where the writ was necessary to enable the Supreme Court to exercise its jurisdiction in giving the plaintiff in a pending writ of error the relief to which he might be entitled under his writ of error.

In Whitney vs. Dick (202 U. S., 132, at page 135), in the very first paragraph of his opinion, Justice Brewer calls attention to the fact that this was a final order of the Circuit Court of Appeals. Hence, while it could not be brought before the Supreme Court by writ of error or appeal under Sec. 241 since the amount in controversy did not exceed One thousand dollars, it could be brought under Sec. 240 since the decision of the Circuit Court of Appeals was final.

In McClellan vs. Carland (217 U. S., 268), certiorari would lie to the Supreme Court for the same reason that the mandamus could issue out of the Circuit Court of Appeals. The plaintiff in the action was entitled to have his cause tried and determined so that he could seek relief in the Circuit Court of Appeals if he should lose and for that reason the Circuit Court of Appeals could issue mandamus. And if he should lose in the Circuit Court of Appeals he would be entitled either under Sec. 240 or 241 to seek relief from the Supreme Court.

And in this connection let us call the court's attention to U. S. vs. Dickinson, 213 U. S., 92, which held that the writ of certiorari will not be granted under the act of March 3rd, 1891 (Court of Appeals Act), in a criminal case at the instance of the United States, *whatever the supposed importance of the questions involved.*

We cite this case as authority for the contention hereinabove made by us that the government is not

entitled to the writ of prohibition because it cannot be a petitioner for appellate relief. And if the government's contention that the power of the Supreme Court to issue prohibition is co-extensive with its power to issue certiorari, then under U. S. vs. Dickinson, this Court could not issue prohibition in this case.

While we submit that the use of certiorari in In re Chetwood, Whitney vs. Dick and McClellan vs. Carland by this Court was in each instance authorized by Sec. 262, 240 or 241; yet we must call attention to the argument of the Solicitor General (pages 9 and 10 of the government brief) that when this Court issued certiorari in those cases it did so under Sec. 262, although the use of the writ was not necessary for the exercise of this Court's jurisdiction. He says that "the writ of certiorari was granted because of exceptional circumstances necessitating its use * * * Neither case could have been brought here by appeal, writ of error or certiorari under the Circuit Court of Appeals Act." *If his argument is correct then we have in Whitney* vs. *Dick the remarkable spectacle of the Supreme Court unlawfully using the writ of certiorari to prevent its unlawful use by the Circuit Court of Appeals. In that event, which court would be the greater offender?*

And the Solicitor General is urging this alleged excess of jurisdiction by this Court in certiorari as a reason why it should *now* exceed its jurisdiction and answer in the affirmative, a question which is not before the Circuit Court of Appeals and which has not been certified here by the Circuit Court of Appeals in accordance with the provisions of Sec. 239. *And he asks this because a United States at-*

torney wishes to poll this Court before trial in a criminal case.

It seems that a very proper answer for this Court to make to this request on the part of the Solicitor General would be merely to call his attention to the language of Justice Brewer in Minnesota vs. Hitchcock, 185 U. S., 373, at page 382:

> "A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this Court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law."

CONSIDERATION OF QUESTION II.

> *"When a writ of error has been issued to review a judgment of conviction in a criminal cause entered in a District Court, has the District Court, upon a motion made after the term at which judgment was entered, jurisdiction to set aside the judgment and order a new trial on facts discovered after the expiration of said term and not appearing in the record of the previous trial?"*

Two circumstances set forth in the question will be relied upon by the government as depriving the District Court of jurisdiction:

I. The term in which judgment was rendered had ended.

II. A writ of error had been taken to the Circuit Court of Appeals and was there pending.

These two circumstances are wholly unrelated; neither strengthens the other. If neither of them, standing alone, would end the District Court's jurisdiction, both of them together cannot. They may therefore be dealt with separately; and first the effect of the lapse of the term on the power of a court to revise its judgments will be considered.

It is doubtless generally stated as familiar law that a court has no power to alter its judgments after the term in which they were rendered; but the reasons for this rule are not often stated and it is everywhere admitted that there are many exceptions to it. In order to determine the proper scope of the exceptions it is essential to determine

the reason of the rule itself. If the rule is based on sound reason a court will feel reluctant to infringe it or to extend exceptions to it. On the other hand if the rule is a mere survival of archaic practice having nothing in the present condition of courts and of society to recommend it, the court will be disposed to enlarge the exceptions as broadly as justice may require and a reasonable regard for precedent permit. To give the necessary foundation for a consideration of the matter, we present under the following headings:

I.

Rules of law and arguments to be deduced therefrom which may affect the power of the District Court to grant a new trial after lapse of the Term.

(a) General rule denying the power of a court to amend its judgments after the term, and gradual tendency to enlarge exceptions to the rule. infra, page 54.

(b) *Writ of Audita querela.* infra, page 65.

(c) Writ of error *coram nobis* or *coram vobis.* infra, page 67.

(d) Equitable procedure to affect a judgment after the expiration of the term in which it was rendered. infra, page 72.

(e) Statutes allowing petitions or motions for new trials after the end of the term in which judgment was rendered. infra, page 77.

(f) A pardon is an inadequate relief for an unjust conviction. infra, page 89.

(g) Decisions on the power of courts to grant, without authority of statute, new trials in criminal cases after the term in which judgment was rendered. infra, page 95.

(h) Greater freedom should be allowed in criminal cases than in civil cases, in granting a new trial. infra, page 103.

(i) Summary of the powers which the United States District Court has to grant a new trial in in a criminal case after the end of the term in which judgment was rendered. infra, page 106.

(j) Even though the lapse of the term deprived the District Court of jurisdiction, the government's consent to the hearing of the motion for a new trial restored that jurisdiction. infra, page 118.

(a)

General rule denying the power of a Court to amend its judgments after the Term, and gradual tendency to enlarge exceptions to the rule.

The rule which denies to the court the right to amend its judgments after the term in which they were rendered is of great antiquity, and the early reason for it not very clearly defined. Perhaps the fact that the court rolls physically passed from

the possession of the judges to the Treasury Office beyond their control, had something to do with the matter; perhaps if the parties were bound to attend upon the court only during the term, any change in the record thereafter was regarded as not binding upon them because they had not consented to the jurisdiction of the court and were not bound by it. Any presumption of absolute verity in the parchment roll when once made up, might preclude the court from making alterations in it, but would not seem to interfere with making additions at the end. There are indications in the early books that whatever may have been the basis of the rule, it was not always observed. It is indeed stated by Britton, whose work was probably written near the end of the 13th century (Book 1, ch. 1, §11, Nichols' translation):

> "And although we have granted to our Justices to bear record of pleas pleaded before them, yet we will not that their record be any warrant to them in their own wrong, nor that they be permitted to erase their rolls or amend them or record contrary to the enrollment."

But in an essay by Luke O. Pike, the well known year-book editor, on "An Action at Law, in the Reign Edward III" (7 Harvard L. Rev., 266, 272), the writer says:

> "It may, perhaps, be thought that the clerk or registrar had a difficult task to perform in entering the pleadings correctly on the roll, and that occasionally he failed. Failure did

occur sometimes, and the roll had to be amended by order of the court. Sometimes also apparently the clerk (who was a very important officer, often consulted by the judges with regard to points of practice) discovered his own mistake, and corrected it by substituting an entirely new record of the case for one erroneously entered."

And Maitland in his introduction to the first volume of the Selden Society's publications (pages IX, X) indicates that there was carelessness not only in returning the rolls to the proper custody, but also in making the record, and incidentally shows that errors in the rolls were sometimes corrected. He says:

"Doubtless some part of our loss we may ascribe to evil chances which befell the rolls after they were deposited in the Treasury, the place appointed for their custody; some of those that exist, despite all that has been done for them of late years, are in evil case; almost or altogether illegible, they tell a mournful story of fire and water and rats and gross human negligence. But there is good reason for thinking that many of their fellows never reached the Treasury. In 1258 an attempt was made to get in those rolls of the last forty years that were in private hands; seemingly the rolls of Stephen Segrave, whose career as a judge had ended in 1234, were still at the Abbey in which he died; Bracton probably, had some fifty rolls in his possession.

> On the same occasion the judges were strictly charged that for the future they must send in their rolls; but the command had to be repeated by statute in 1335 and again in 1409. * * *"

> "The earliest rolls are often very untidy and are disfigured by erasures, interlineations and clerical errors corrected and uncorrected."

Originally the difficulty of amendment seems to have existed whenever the term was past even though the suit was still pending. Blackstone says (3 Comm., 406, 407):

> "Formerly, the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings and other mistakes of the clerks, all which might be amended at the common law, while all the proceedings were in *paper*, for they were then considered as only in *fieri*, and therefore subject to the control of the courts. But, when once the record was made up, it was formerly held that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration. But now the courts are become more liberal, and, where justice requires it, will allow of the amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past. For they at present consider the proceedings as in *fieri*, till judgment is given; and therefore, that till

then they have power to permit amendments by the common law; but when judgment is once given and enrolled, no amendment is permitted in any subsequent term."

But it seems from the final clause of a statute enacted in that year, that as early as 1409, the term when judgment was entered was the final time for possible correction of the whole case. The statute (11 Henry IV, c. 3), provides:

> "*Item*, it is ordained and established, 'That the justices assigned, and to be assigned, to take assises by commission of our Lord, the King in the counties of the realm, from henceforth shall cause to be delivered fully in the King's treasury, all the records of assises of *Novel dissesin*, of *Mortdauncester*, and of certifications, with all the appurtences and appendances before them determined, every second year, that the plea thereof be determined, and judgment given without more delay. (2) And that the records and process of pleas real and personal, and of assises of *Novel dissesin*, or *Mortdauncester*, and certifications, and of others, whereof judgment is given and inrolled, or things touching such plea, shall in no wise be amended nor impaired by new entering of the clerks, or by the record or thing certified in witness or commandment of any justice, in no term after that such judgment in such pleas is given and inrolled.'"

Coke states the doctrine in its most extreme form (Co. Litt., 260 a):

> "And the rolles being the records or memorialls of the judges of the courts of record, im-

port in them such uncontrollable credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record you may read in my Reports: but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie."

It is obvious that the reason given by Coke and faithfully repeated ever since, that during the term "the record remaineth in the brest of the judges," and Blackstone's statement that during the term the proceedings were "in paper" and considered as "*in fieri*," if they ever had any real meaning have had none for centuries. One might quite as well say, the thing is so, because it is. Taken literally, the rule was too extreme to be tolerable. In a number of cases small in proportion to the whole, but nevertheless numerically large, under such a rule the results of fraud and mistake would be enforced against persons morally without fault and when the fraud or mistake could easily be shown.

In the early common law clerical errors of the most obvious kind might prove fatal and a failure of the clerk to carry out the order of the court,

might present an insuperable difficulty. Statutes of jeofails were passed from time to time to remedy the most crying evils of this sort; but these statutes were generally aimed rather at the correction of careless errors in recording and misprisions of the clerks than at extending the power of the court to revise its own judgments. More or less insensibly, however, the courts extended their power as may be seen from an examination of the cases. Neither in the early common law nor under the statutes which have been alluded to, had the court permitted itself to revise after the term a matter which had either been found by a jury or which the court itself had previously decided, though the decision was based on a mistake. The first reported case where a trial court granted a new trial in the modern sense, even where no difficulty because of the lapse of the term existed, was not decided until about 1655. (See Thayer, "Preliminary Treatise on Evidence," page 170). And how unwilling the court was to correct its own errors may be seen from Villars vs. Parry, 1 Ld. Ray., 182 (decided in 1697). A joint judgment for £4000 had been given, instead of several judgments of £2000 each, against two defendants. Though the obligation was confessedly several and the error was admitted, and though the effect of it was to make each defendant liable for £4000 instead of £2000, and though the error was due to pure mistake and not to any conscious decision of the question by the court, yet amendment was denied because the term had elapsed.

This case may be compared with Philips vs. Smith, 1 Strange, 136 (decided in 1715), where the court advanced a step. Application was made

after the term to amend various clerical errors and also to insert in the record orders by the court for continuing the case during its pendency from term to term. It will be remembered that at common law unless an unfinished case was ordered to be continued till the next term, and unless the order appeared on the record, the case was discontinued and no longer before the court. These orders for continuances had doubtless become purely formal and were made as matter of course; but still they remained in theory judicial orders, acts of the court. Nevertheless, though no orders were made and the lack of continuance would have been fatal, the court allowed the insertion of the necessary continuances in the record. The report reads (at page 138):

> "And afterwards when it came on again, the court declared for all the amendments, except the want of continuances, which they had debated again. And for the amendment the former arguments were insisted on; and 1 *Roll. Abr.*, 200, pl., 27. *Yelv.*, 156. 26 H., 6 *Amendment*, 33, were cited. In answer to which it was insisted, that continuances were the act of the court, and the statute 8 H., 6, extends only to misprisions of the clerk. 8 *Co.*, 156 *b.*, *Stiles*, 339, 3 *Lev.*, 431. And towards the end of the term the Chief Justice delivered the opinion of the court, that the continuances might be entered at any time, as well after as before judgment; and a distinction was taken between ministerial and judicial acts, the first of which were at common law amendable at any time, but the latter not after the same term. And as to amendments of judicial acts

a difference was made between amendments which deface and alter the record, and such as are only additional to it, in order to eke it out and compleat it."

It is unnecessary to trace further steps in detail. It should be observed, however, that in Queen vs. Tutchin (1 Salk, 51), Holt and two associate judges resolved that:

"Whatever at common law might be amended in civil cases was at common law amendable in criminal; and so it is at this day."

In the United States the practice was summarized in Bank of the United States vs. Moss (6 How., 31), where this Court after denying the right of the lower court to set aside a judgment after the term, said (page 38):

"We would not be understood by this to deprive a court, at a subsequent term, of power to set right mere forms in its judgments. 3 Wheat., 591; 3 Peters, 431; 12 Wheat., 10; Lawrence vs. Cornell, 4 Johns. Ch., 542. Or power to correct misprisions of its clerks. The Palmyra, 12 Wheat., 10; Hawes vs. McConnel, 2 Ohio, 32; 1 Greenl., 375; Com. Dig. *Amendment*, T. 1. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains. Sibbald vs. United States, 12 Peters, 492; Newford vs. Dorsey, 2 Wash. C. C., 433; 6 Watts, 513; 8 Watts, 424; 1 Wendell, 101; 4 Wendell, 217; 1 Bibb., 324; 2 Bibb., 88; Weston's case, 11 Mass., 417; The Bank vs. Wistar, 3 Peters, 431. Irregularities,

also, in notices, mandates, and similar proceedings can still, in some cases, be amended. Ex parte Crenshaw, 15 Peters, 123.

Indeed any amendments permissible under the statutes of Jeofails may be proper at subsequent terms (2 Tidd's Pr., 917; 2 Arch. Pr., 202, 243); and at times even after a writ of error is brought. 2 How., 243; 3 Johns., 95; Poph., 102; Pease vs. Morgan, 7 Johns., 468; Cheetham vs. Tillotson, 4 Johns., 499; 1 Johns. Ca., 29; 2 Johns., 184; 1 Bing., 486; Douglass vs. Beans Executors, 5 Bing., 60. So it is well settled, that at a subsequent term, when the judgment had before been arrested, an amendment may be made to apply the verdict to a good count if another be bad and the judge's minutes show that the evidence applied to a good count (Matheson's Adm. vs. Grant's Adm., 2 How., 282, and cases cited there)."

And added

"Judgments entered up by fraud may, perhaps, on due notice, by *scire facias*, or otherwise, be vacated at a subsequent term by the same court, or if offered in evidence be deemed a nullity, should fraud be clearly proved to have taken place. 2 Roll. Abr., 724; 2 Bac. Abr., *Error*, T. 6."

In later cases before this Court the general rule denying the power of a court to alter its judgments after the term in which they are entered is recognized and applied, both to judgments of lower courts,

Bronson vs. Schulten, 104 U. S., 410;
Phillips vs. Negley, 117 U. S., 665;

Tubman vs. Baltimore & Ohio R. R. 190 U. S., 38;
In re Metropolitan Trust Co., 218 U. S., 312.

and to its own judgments.

Public Schools vs. Walker, 9 Wall., 603;
Bronson vs. Schulten, 104 U. S., 410, 415, and cases cited;
Gagnon vs. United States, 193 U. S., 451.

But the exceptional cases referred to in the extract from the opinion in Bank of United States vs. Moss are certainly not likely to be more narrowly confined to-day than formerly.

Before attempting to decide the extent of these exceptional cases it is necessary to consider several kinds of independent proceedings by which a judgment might be affected after the close of the term; for, as will be seen, much of the power formerly exercised in these methods may now be exercised by motion. It is desirable to determine how far by any means whatever, at common law judgments either civil or criminal, might be affected, in order to understand what difficulty there may be in the proposed action by the District Court in this case and how far such difficulty as exists is purely a matter of procedure and how far it is based on matters of substance.

Besides writs of error for the correction of errors of law by a higher court, three kinds of proceedings have been recognized for centuries by which judgments at law might be affected after the term, namely:

1. The writ of *Audita Querela.*
2. The writ or error *coram nobis* or *coram vobis.*
3. Bills in equity.

The extent of relief granted in these methods is indicated in the following pages:

(b)

Audita Querela.

Blackstone, (3 Comm., 406) thus describes the writ of *audita querela*

> "An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: as if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit, or *puis darrein continuance*, which, as was shown in a former chapter" [see page 316] "must always be beforejudgment), an *audita querela* lies, in the nature of a bill in equity to be relieved against the oppression of the plaintiff. It is a writ directed to the court, stating that the complaint of the defendant hath been heard, *audita querela defendentis*, and then, setting out the matter of the complaint, it at length en-

joins the court to call the parties before them, and having heard their allegations and proofs, to cause justice to be done between them (Finch, L. 488, F. N. B., 102). It also lies for bail, when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed: for here the bail, after judgment had against them, have no opportunity to *plead*, this special matter, and therefore they shall have redress by *audita querela;* (1 Roll. Abr., 308), which is a writ of a most remedial nature, and seems to have been invented lest in any case there should be an oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law.

"But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, (Ld. Raym., 439) has almost rendered useless the writ of *audita querela*, and driven it quite out of practice."

The time for bringing the writ was not limited.

Stone vs. Seaver, 5 Vt., 549.

The use of the writ was not confined, as perhaps might be inferred from the extract quoted above from Blackstone's Commentaries, to cases where the defendant's defense arose after judgment. Thus a judgment confessed under duress or by an infant might be attacked by this means.

Fitz Herbert, Nat. Br., 238,

or a judgment rendered without statutory requisites of service of process.

Folan vs. Folan, 59 Me., 566;
Harmon vs. Martin, 52 Vt., 255.

The one essential was that the party praying for relief had had no legal opportunity to avail himself of his defence.

See

Avery vs. United States, 12 Wall., 304.

The writ was not available in criminal cases.

(c)

Writ of error coram nobis or coram vobis.

In United States vs. Plumer, 3 Cliff., 28, 58, Mr. Justice Clifford thus described these writs:

> "Errors of fact in the process issued in a civil action, or such as happened through the fault of the clerk in the record of the proceedings prior to the judgment, might be corrected at common law by a writ of error sued out and returnable in the court where the action was commenced and where the judgment was rendered. When granted to re-examine a judgment rendered in the King's Bench, the writ was called a writ of error *coram nobis*, because it was founded upon a record and pro-

cess described in the writ as remaining 'before us,' in accordance with the theory that the sovereign of the kingdom presided in the court. 2 Tidd, Prac., (Am. Ed., 1856) 1137; Jacques vs. Cesar, 2 Saund. 101, note 1; De Witt vs. Post, 11 Johns., 460. Such writs might also be sued out in the Common Pleas for a like purpose, that is, for the correction of errors of fact in the process of a civil action, or such as happened in the record of the proceedings through the fault of the clerk; but the writ when sued out and returnable in the latter court was denominated a writ of error *coram vobis*, because the writ was directed to 'you and your associates,' meaning the chief justice and the other justices of that court. I Archb. Prac., (6th Ed.) 504. Apart from the fact that these formal differences designated the particular court in which the judgment was rendered, and to which the writ was returnable, they were never of any practical importance, as the office of the writ of error was the same in both courts."

The writ is directed only to the court which rendered the judgment, not to a superior court.

Irwin vs. Grey, L. R., 2 H. L., 20, 26.
Land vs. Williams, 12 Sm. & M., 362,

and is applicable to criminal cases.

United States vs. Plumer, 3 Cliff., 28, 59;
Adler vs. State, 35 Ark., 517;
Sanders vs. State, 85 Ind., 318.
State vs Calhoun, 50 Kan., 523.

State vs. White, 75 Mo. App., 257.
State vs. Clarkson, 88 Mo. App., 553.
Chitty Crim. Law (2nd ed.), 748.

Indeed it is stated by Chitty (Crim. Law, p. 748) that "the most usual way of obtaining a writ of error is to remove the record by certiorari into the crown-office, and then to bring a writ of error *coram nobis*." The writ may be brought after the expiration of the term.

State vs. Calhoun, 50 Kan., 523.
Powell vs. Gott, 13 Mo., 458.

And in criminal cases under this writ, errors of law as well as of fact were open to examination.

United States vs. Plumer, 3 Cliff., 28, 60.

As to the cases within the scope of the writ, which is much too narrowly stated in United States vs. Plumer, this court has said in Bronson vs. Schulten (104 U. S., 410, 416), after referring to the general rule that judgments cannot be altered after the close of the term in which they were rendered,

> "but to this general rule an exception has crept into practice in a large number of the State courts in a class of cases not well defined, and about which and about the limit of this exception these courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram robis*, a writ which was allowed to

bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through default of the clerk. See Archbold's Practice.

In Rolle's Abridgment, page 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court.

In Pickett's Heirs vs. Legerwood, 7 Pet., 144, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in the British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case."

These exceptional cases were again referred to in

Gagnon vs. United States, 193 U. S., 451, 457.

The cases enumerated in this quotation are not the only ones, however, where the writ has been successfully invoked. In Rex vs. Wilkes, 4 Burr., 2527, 2551, Lord Mansfield said:

> "In 1708, Lord Griffin was brought into this Court upon an outlawry for high treason: and upon the prayer of the Solicitor-General (there being then no Attorney-General), a rule was made for his execution. He was reprieved, from time to time, till his death. His grandson and heir, from the grace and favour of King George the First, obtained a writ of error. Sir Philip Yorke, then Attorney-General, came into Court, and said he had a Sign Manual 'to confess the errors and consent to the reversal.' The Court told him 'his confessing an error in law would not do: They "must judge it to be an error; and their judgment would be a precedent. But the plaintiff in error might assign an error in fact; which, by proper authority, he might confess."' Accordingly, the plaintiff assigned an error in fact, viz. 'that the place of his grandfather's residence was in the county of Northampton; whereas he had been outlawed in London.' The Attorney-General confessed the fact; whereupon, the outlawry was reversed."

It will be observed that here the court reversed its decision for error in a matter of fact which was necessarily involved in the original decision, since that necessarily involved a finding that the residence of the defendant was in London.

In Sanders vs. State (85 Ind., 318), and in State vs. Calhoun (50 Kans., 523), the writ was allowed to relieve an accused defendant from the consequences of a plea of guilty made through duress caused by threats of mob violence.

In Adler vs. State (35 Ark., 517), and in Hydrick vs. State (Ark.) (148 S. W. Rep., 541), the writ was allowed on the assignment of error that the accused was insane when tried.

It is doubtless true that generally the writ did not lie to correct an erroneous decision of a question of fact raised and decided at the trial. It may be thought that this limitation was unfortunate; that the court of law should have dealt with such errors as courts of equity have done. Especially in criminal cases where courts of equity are powerless to correct the most flagrant abuses, the trial court should have reserved to itself the power to correct its own errors at any time if justice required, when newly discovered evidence clearly showed that an issue of fact dealt with at the trial was wrongly decided.

(d)

Equitable procedure to affect a judgment after the expiration of the Term in which it was rendered.

Courts of equity early recognized that the rigidity asserted by courts of law in regard to their judgments was intolerable under certain circumstances. That a judgment secured by fraud or by an improperly constituted tribunal or even contrary to the plain facts of the case which, without fault of

the complaining party were unknown to him at the time of the trial at law, should stand as a final adjudication of a dispute, seemed so clearly at variance with elementary principles of justice as to call for relief.

Equity never undertook to try over again the issues of fact determined by a court of law if that court had before it or might have had before it, had the parties been diligent, all the facts bearing upon the issue. But when a new case was presented by virtue of added facts which without fault of the complainant were unknown to him and which would have affected the decision of the case, equitable relief was given. If the facts presented were of significance only to a court of equity, the court in which the bill was filed would itself examine them and, if the complainant made out a case, would absolutely and permanently enjoin the respondent from taking advantage of his judgment at law; whereas if the allegations of the bill merely showed that all the facts material at law had not come before the court of law, since it must be assumed that if those facts were brought before that court they would have been given due weight, the court of equity in effect directed a new trial at law; and similarly if the bill in equity set up partiality in the legal tribunal, equity directed in effect a new trial before a properly constituted tribunal. As it was expressed in

> Cummins vs. Kennedy, 4 J. J. Marsh., 642, 645.

> "The chancellor should compel a new trial at law when the complaining party shall have shown clearly, that he had grounds *exclusively*

legal, which he could have so far maintained, as to have entitled him to a judgment more advantageous, than that of which he complains, if he had had a reasonable opportunity of being prepared on the trial at law; and also, that he was unable by the use of ordinary diligence, to prepare for the trial or to move the common law court for a new trial. If the only ground for relief in chancery be purely equitable, or such as the chancellor had original jurisdiction of, concurrently with the common law judge, a new trial should not, as a matter of course be decreed, but the court should generally close the controversy by a decree settling the rights of the parties without remitting them to the decision of a common law tribunal. This is however, only a general rule, which is not, of course, inflexible or universal in its application to cases in which chancery and common law have concurrent jurisdiction."

A court of equity could not directly issue its order for a new trial to the court of law, but it could enjoin the respondent in equity from availing himself of his judgment at law as a defense to further proceedings to try anew the issue previously wrongly decided at law.

This familiar jurisdiction of courts of equity needs no elaboration of citations. It has been recognized by this court from the early days of the Republic until the present time. In Pickford vs. Talbott, 225 U. S., 651, 657, the court said:

"The principles upon which the decision of the case must turn are entirely familiar. In

order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment.

"As Chief Justice Marshall said: 'Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself on a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' Marine Ins. Co. vs. Hodgson, 7 Cranch, 332, 336. Or, as Mr. Justice Curtis expressed it, in Hendrickson vs. Hinckley, 17 How., 443, 445: 'A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or

accident, unmixed with negligence of himself or his agents.'"

That a partial tribunal such as is complained of in the present case has been from the beginning of the jurisdiction, a recognized ground for relief appears from Tovey vs. Young, Precedents in Chancery, Case 157, page 194, where the Lord Keeper (Wright) said:

> "Bills for new trials ought to be reduced to some certainty; the grounds for relief were usually partiality in the jurors, or new discoveries."

And for such bias equitable relief was granted in Platt vs. Threadgill, 80 Fed. Rep., 192.

Courts of equity not only undertook on proper occasion to review the decisions of the courts of law but also undertook by bills of review to revise their own decisions. It is in regard to the filing of bills of this last kind that previous leave of court is required (See Foster's Federal Practice, Vol. 2, 5th Edition, section 448). Reference was made in Fuller vs. United States, 182 U. S., 562, 567, to the rule prevailing in equity, and to the importance of distinguishing such cases from proceedings to vacate or affect judgments at law.

No discussion is in place in this case, where the judgment is in a criminal case, of the details of the rules which courts of equity have established with reference to the relief which they afford, for equity never has interfered with criminal prosecutions, presumably because of the impossibility of enjoining the Sovereign, the complainant in criminal cases. But it is worth noting that the relief grant-

ed by equity involves a recognition of the existence of a serious evil in the rigidity of the rule of the common law in regard to its judgments; and, further, that the same evil exists in criminal cases as in civil cases. It will, hereafter, be urged that in criminal cases the evil demands redress even more insistently than in civil cases.

(e)

Statutes allowing petitions or motions for new trials after the end of the Term in which judgment was rendered.

In many states there are statutes expressly allowing a petition or motion for a new trial at any time within a fixed named period after the rendition of judgment, for specified reasons, one of which always is newly discovered evidence. A statute of this sort was under consideration by this Court in Fuller vs. United States, 182 U. S., 562.

Whatever form the proceedings under these statutes take, it is recognized that the proceeding is in effect a new action, not a continuance of the old action. The old action by the expiration of the term has been finally disposed of and the parties dismissed from the court. The issues in that action have become *res judicata* so far as the facts then before the Court are concerned; but the adjudication having been only upon the facts then brought to the attention of the Court, the decision if directly attacked, is not conclusive upon the rights of the parties, if further vital facts, previously unknown

in spite of all proper diligence of the losing party and his attorney, are later brought to the attention of the Court. That the proceeding is to be regarded as in the nature of a new action has been frequently stated though the statutes in terms do not so provide. Thus in Hines vs. Driver (89 Ind., 339, 343), the Court said:

> "Much of the apparent conflict between the cases referred to in argument has arisen from a failure to observe the essential difference between an application for a *new trial made during the term* and an *independent proceeding* to obtain a *new trial instituted after the close of the term*. In the first case the order which disposes of the application is only an interlocutory order, subject to the control of the court until final judgment and only capable of being reviewed in connection with other proceedings in a cause in which it is made. In the latter case the proceeding, being an independent one and having but a single object in view, the order which makes a final disposition of the cause is necessarily a final order and hence a final judgment within the meaning of Section 632 of the Civil Code."

In Harvey vs. Fink (111 Ind., 249, 254), the same Court said:

> "The proceedings upon such a complaint become *a separate and distinct action* and the ultimate result reached through such proceedings constitutes a final judgment from which an appeal may be prosecuted to this court."

In Gottleib vs. Jasper & Co. (27 Kan., 770, 773), the Court said:

> "This petition for a new trial although instituted merely for the purpose of obtaining a new trial in an action to which it is merely incident, may also in one sense be called an action itself, and a new and independent action; and so far as it is a new and independent action, we suppose it should be governed by the rules of procedure governing other actions."

This principle was recognized in Fuller vs. United States, 182 U. S., 562, 576, where the Court, in dealing with a similar statute in Arkansas, said that such an application for a new trial constituted "a new action."

Similarly, in speaking of the Federal Statute which allows the Court of Claims to grant a new trial for certain causes at any time within two years after the final disposition of a case, this Court said in *Ex parte* Russell (13 Wall., 664, 669):

> "It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practiced upon the Government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud."

This was quoted with approval in Fuller vs. United States, 182 U. S., 562, 571.

(f)

A pardon is an inadequate relief for an unjust conviction.

It is sometimes argued that in our system of criminal law a pardon is the equivalent of the larger relief afforded in civil cases where a judgment has been given which after discovered evidence proves to have been erroneous. That a pardon was under the English system in some cases the only redress which was open to a person who had been unjustly convicted need not be disputed; but this is a very different thing from asserting or admitting that the remedy of a pardon is adequate, or even that it is in any sense an equivalent for the relief granted in civil cases by appropriate proceedings.

For two reasons a pardon is wholly inadequate relief for one who has been improperly convicted. In the first place, though the conviction may be unjust because the safeguards provided by the law in criminal trials have not been observed, the accused may be unable to prove with sufficient clearness to the pardoning power that he is innocent, to induce the executive to act in his favor. In the second place, even though a pardon is granted, the accused is wronged in being denied the opportunity of proving that he is unjustly accused and not a pardoned offender.

In regard to the first of these points it is to be observed that the law presumes an accused man to be innocent until it is proved, beyond a reasonable doubt, that he is guilty in the judgment of an impartial tribunal. If, as in this case of *Freeman's* the tribunal has been partial, the conviction is im-

proper, and the accused should still be entitled to the presumption that he is innocent. He should not be required to convince an executive officer that he is innocent and beg for a pardon. He should be entitled to stand as an innocent man until convicted by a properly constituted *jury* according to the rules of law. It can hardly be supposed that the executive would pardon a convicted defendant on the mere showing that the trial had been erroneously conducted. Proof would be demanded that the accused was, in fact, innocent. *In other words, the burden would be thrown upon the accused to prove his innocence to an executive officer; whereas the government should be required to prove his guilt to twelve impartial jurymen beyond a reasonable doubt.*

From the standpoint of the government, on the other hand, a pardon is equally unsatisfactory as a remedy. The executive must either take the position that a pardon ought not to be granted unless he is convinced of the defendant's innocence, in which case he is obliged to assume the functions of a Court, without its facilities for arriving at the truth; or he must take the position that one who has not had a fair trial and has not been able to show this in time to secure relief from the Courts is entitled to a pardon, in which case, the executive may feel obliged to pardon a guilty man, who even though he had a fair trial would, nevertheless, have probably been convicted. No remedy but a new trial by a judicial tribunal according to the rules which ought to be observed in such trials can satisfy the demands of justice. That multiplication of new trials in criminal cases is an evil, and that such new trials ought not to be granted unless it is clearly made out that a fair trial has

not been had, is no reason for denying a new trial where the Trial Court is satisfied that the conduct of the original trial was erroneous. It must be assumed that the discretion of the Trial Judge will be carefully and wisely exercised.

In the second place, even if a pardon be obtained it is an inadequate redress. To say that a pardon is the equivalent of an acquittal is to say what is obviously opposed alike to the English language, common understanding, and to the law. In the English language "pardon" is not an appropriate word to use in regard to an innocent man. It implies guilt and forgiveness of guilt, not the establishment of innocence. Such is also the common understanding of any community in regard to one who has been pardoned. He is not given the faith and credit of an innocent man. The stigma of guilt remains upon him unless the facts of the case are notorious, and clearly prove that the original conviction was wholly unwarranted. Even in such an exceptional case, it is not the pardon which leads the community to give credit again to the accused, but the judgment which the community has itself passed upon the facts of the case.

Nor does the law, in defiance of the English language and of common understanding, assert that a pardon amounts to anything more than a forgiveness by the State of the consequences of the defendant's guilt, so far as the State is concerned. The punishment due to the State is excused, but that is all. Bracton says (Vol. II, page 371, Twiss' translation):

> "But in all the aforesaid cases, whatever may have been the cause, when the outlawry has been made duly and according to the law

of the land, a person is not restored except to the king's peace alone, that he may go and return and contract anew, for that which has been dissolved by the outlawry cannot be joined anew by the inlawry without a new intention on the part of those who have contracted. For the king cannot grant a pardon with injury or damage to others. He may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace. Likewise a person justly and duly outlawed is not restored to anything except to the king's peace, that he may go and return and have protection, but he cannot be restored to his rights of action and other things, for he is like a new-born infant and a man as it were lately born. Likewise inlawry does not restore a person to his previous actions and obligations, nor to his homage nor fealties, nor to his oaths, nor to other things dissolved by his outlawry, against the will of those by whose will they were previously united and confirmed, and accordingly neither to his inheritances nor to his tenements to the prejudice of the lords, and so they cannot be restored to those things to which they had only a right. But no one is bound to them by preceding obligations, but they are bound to all others, that they may not be in a better condition on account of their outlawry, since they ought to be in a worse condition."

The phrase in this extract that a pardoned man is "like a new-born infant and a man as it were

lately born" has been often repeated in substance down to the present day and not infrequently has been misunderstood. It has sometimes been thought to mean that a pardoned man, by the pardon, is established as an innocent man, but the remainder of the extract shows that this is not the meaning of the words. An innocent man should be entitled, not to start life afresh "as a new-born infant" deprived of his old rights, but to continue to be his *old* self with *all the rights and credit which he has previously gained* and free from the stigma of conviction. To the same effect as Bracton is the following extract from Pollock and Maitland's History of English Law (Vol. 2, page 481):

> "The king could not protect the man-slayer from the suit of the dead man's kin. Even when the pardon was granted on the score of misadventure, this suit was saved by express words. Proclamation was made in court inviting the kin to prosecute, but telling them that they must come at once or never. What could the kin do in such a case? They could make themselves extremely disagreeable; they could extort money. In Henry III's day Mr. Justice Thurkelby was consulted by a friend who had obtained a pardon, but was being appealed. The advice that the expert lawyer gave was this: 'You had better go to battle; but directly a blow struck cry 'Craven' and produce your charter; you will not be punished, for the king has given you your life and members."

Coming then to a somewhat later day (1609) the following extract from Pulton, *de Pace Regis*, 218, 220, is instructive:

> "The king's Pardon is a barre to an indictment of treason or felonie; which graunting of Pardon is one of the most ancient and honourable prerogatives that is annexed to the Impe'riall Crowne of this Realme, being an authoritie in a sort to revive a dead man, and to continue him in life, whom the Lawe adjudged to die. And it is only granted upon a good hope that the king hath of the amendment of the life of that subject, who hath offended his lawes."
>
> "When a man doth plead the Kings pardon of any homicide, robberie, felonie or other trespasse, he ought also to bring with him a writ of allowance, testifying that he hath found suretie, according to the Statute of añ 10 Ed. 3, which hath established, That if the King doe grant to any person any Charter of pardon of any homicide, robberie or felonie, then he to whom the same is granted shall come within three months next after the making of the same, before the sherife and Coroners of the Countie where the felonie was done, and shall find sixe good and sufficient mainpernors, for whom the said sherife and Coroners will answer, that he from thenceforth shall beare himself well and lawfully. And the maineprises shal be sealed and returned into the chancerie, within three months after the end of the said three months. And if hee which have such Charter will ayd himself thereby,

> and hath not found such mainprises, or after such mainprise found, doth beare himselfe otherwise against the peace, than he ought, his charter shal be accounted void & of no force."

A statute would hardly make an innocent man find sureties for his good behavior; nor would the King have "a good hope" that the accused would "amend his life," if he really thought the accused was originally innocent or even that he had become so.

This distinction as to the meaning of a pardon making the offender a new man is also brought out in the case of Cuddington vs. Wilkins (Hobart, 81, 82) where in an action for slander in calling one convicted of theft but pardoned, a thief:

> "It was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain if he be cured or manumissed, but that he had been a thief or a villain he might say."

The "new man" was not a thief, but it still remained true that the former man had been. So, though a pardoned felon was no longer infamous, and, therefore, might testify, he was not, nor is he to-day entitled as a witness to the same credit as a man who had been acquitted. In Rookwood's case, Holt, 683, 685:

> "Porter being called to give Evidence, the Prisoner's counsel opposed the swearing him, because he stood convicted of Felony, and was not capable of being a Witness; and the Record of his Conviction was read, and the

Prisoner's Counsel insisted, that though he had the King's Pardon, that would not restore him to his Credit, so as to make him capable of being a Witness.

But the Court held, that the King's Pardon was as effectual as a Parliament Pardon; and either of them before Attainder (as their Case was) prevented all Corruption of Blood; so that though a man forfeited his Goods by Conviction, yet after a Pardon, he is capable of having new goods, and shall hold them without any forfeiture forever; for the Pardon restores him to his former Capacity, and prevents any further Forfeiture; Indeed if he had been attainted, condemned or outlawed) whereby his blood would have been corrupted, no Pardon, whether it were by the King, or by the Parliament, could purge his Blood, without a Reversal of the Attainder by Writ of Error, or Act of Parliament, or express words in the Act, restoring him to Blood; The Conviction indeed might be objected to his Credit, but could not be urged against his being a Witness."

See further Wigmore on Evidence, Secs. 523, 1116.

In Ex parte Garland, 4 Wall., 333, this court considered the effect of a pardon and held that a pardoned Confederate soldier was entitled to be reinstated as a practitioner of law before this Court in spite of an Act of Congress denying that right to ex-Confederates. An interesting analogy to the old authorities referred to above, which hold that pardon by the state cannot deprive injured relatives of their rights against an accused criminal,

may be found in the cases before this court which have held that pardoned confederate soldiers, while freed by the pardon from all forfeitures due to the state, are nevertheless, deprived permanently of property adjudged forfeit before the pardon was granted.

> Ex parte Garland, 4 Wall., 333.
> United States vs. Padelford, 9 Wall., 531, 542.
> Wallach vs. Van Riswick, 92 U. S., 202.

See also

> Hart vs. United States, 118 U. S., 62.
> Austin vs. United States, 155 U. S., 417.

How far this court is from regarding a pardoned convict as necessarily an innocent person may be seen in the following extract from the recent case of Bradford vs. United States, 228 U. S., 446, 452:

> "It will be observed from the allegations of the petition that appellant not only had been convicted of defrauding the government of certain lands, but that he was charged with fraud in regard to the lands which he relinquished, and on account of which he contends a contract arose between him and the government. This must be regarded as an element in the consideration of the case. Appellant was a convicted wrongdoer in two cases; he was a suspected wrongdoer in the other cases, and from that standpoint the government dealt with him; and he was a petitioner for a pardon. The pardon was granted, but upon

terms. He was to make restitution for his wrongdoing. The defrauded government was to be made whole. And not by wresting from him a right, either directly or through the coercion of circumstances, but by his voluntary reparation, securing thereby the government clemency.

Appellant, therefore, was not deprived of his lands in the sense for which he contends, nor evicted from them. He voluntarily relinquished them for a benefit to himself. But he asserts that the relinquishment was upon conditions especially reserving rights which put the United States under indebtedness to him. The contention is anomalous. Convicted of two offenses and under sentence for them, and suspected of others, he asks that not only the punishment may be remitted, but that reimbursement of expenses and outlays be made him. And this he bases on the agency which he contends was given the district attorney and the effects of the laws of Louisiana.

Plainly the power of the district attorney was limited by the subject-matter of his agency. He was to secure restitution, not to engage for payments by the United States, amounting to over $15,000,—payments for something which could be of no benefit to the United States, which would be mere uncompensated out-lay; not reparation received from appellant, but indemnity given to him. And it is to be observed that the restitution was to be 'in respect to all lands, land titles, or claims to lands.' It is true that the restitution was to be made to the 'satisfaction' of the dis-

> trict attorney, but this did not enlarge his agency to do more than accept restitution."

If the defendant in that case had really been innocent, or were made so by the pardon, he certainly had a moral claim and under the law of Louisiana, perhaps a legal claim, to the restitution which the district attorney promised.

The truth of the whole matter is exactly expressed in Sanders vs. The State, 85 Ind., 318, 322:

> "The right to pardon is vested in the chief executive of the State, and this, it is suggested, is the source from which relief must be obtained in such cases as this. But if the courts have power to grant relief, the fact that the Governor may pardon does not abridge a party's right to appeal to the courts for assistance. The power to pardon does not exclude the right to hear and determine; both powers may concurrently exist. Nor is a pardon always adequate relief. An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power can not do. To pardon is to exercise executive clemency; it is an act of mercy. An acquittal is the vindication of a right, the award of justice. Again, the executive may not feel warranted in turning a condemned criminal loose, and as he can grant no new trial, this he must do or deny a pardon. The Court need not discharge, but may put the accused again to trial. We cannot believe that the power to pardon was

meant to cover every case of an unjust conviction, where the accused had, without fault on his part, not availed himself of the right of appeal."

There is no reason to suppose that this extract which is obviously true in fact is not equally accurate in law.

That a pardon has been in England until the statute of Criminal Appeals of 1907, the sole redress of an accused person who has been unjustly, but with legal formality, found guilty of a felony even though the term had not elapsed, or of one similarly convicted of a misdemeanor where the term had elapsed, is admitted; but it is worth noting what an acute English critic, himself afterwards a judge, has said of the system:

"However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.

This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secre-

tary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious." (Fitz James Stephen, History of the Criminal Law, Vol. I, page 312.)

This defect in English procedure is corrected by the Act of 1907 creating a court of criminal appeal, with the widest powers including the right to hear further evidence and decide questions of fact, and in a case where it was asserted that two jurymen were biased the appellate court allowed the facts to be proved before it.

Rex vs. Hancox, 29 T. L. Rep., 331.

An interesting suggestion as to a difference between the situation in the United States and in England which affects the efficacy of the pardoning power for the needs of justice (though even in England a pardon is confessedly inadequate redress), may be found in the opinion of Kane, J., in the case of the United States vs. Harding, 1 Wall. Jr., 127, 141, where he says, in defending the right to grant new trials in cases of felony, though this was not done in England:

"But there is a reason for our departure from the English rule, which is to my mind

conclusive. The British constitution, like the common law, is made up in a great degree of principles inferred from long continued usage. Among these is the combined attribution to the sovereign, as the fountain at once of justice and mercy, of the power and the duty to apportion punishment to the guilty, and to shield the innocent from wrong. Whatever assurance the English people have that the other powers of sovereignity shall be rightfully exercised, they have in regard to this. It is surrounded by the same safeguards against non user as well as against abuse. I do not remember to have read of a single instance in which the judicial recommendation has been disregarded by the ministers of the crown, and I do not suppose that it would be without a breach of the constitution of the realm.

In England, therefore, the denial to the courts of a revisory power over verdicts in any cases, is apparent rather than real. The judge, if dissatisfied with a conviction on the merits, respites the sentence or reprieves the prisoner, and the king's prerogative interposes to do justice as a thing of course. If there be a doubt upon any point or proceeding connected with the case, such as with us would be reviewed on a motion for new trial, the judge reserves the question—it is argued by counsel upon his report before the twelve judges, and the action of the king is determined by their advice. Indeed, the pardoning power in England is so entirely regarded as forming part of the justical administration, that from the time of the statute of Gloucester, c. 9, down to

the present day, the right of a prisoner to demand a pardon, under certain circumstances has been expressly and repeatedly affirmed by acts of Parliament.

It is unnecessary to refer to our American constitutions to show that the power of pardoning as conferred by them—in consequence of the absolute and entire separation of the judicial from the executive departments, and the exclusion of the former from the right to grant reprieves—cannot relieve a judge from the responsibilities of an erroneous or improper conviction. With us, therefore, the new trial becomes an indispensable resort."

The distinction taken by Judge Kane is illustrated in the case of *Ex parte* Garland (4 Wall., 333). In that case it was held that any attempt by Congress to interfere with the exercise of the pardoning power of the executive, by providing certain immutable punishments for those who had taken part in the confederate cause, was unconstitutional. That is, the pardoning power of the executive was held to be absolutely independent of the legislative branch of the government. It must necessarily be equally independent of the Judiciary.

It will be seen, therefore, that even under the English system where the securing of a pardon is to some extent the duty of the judiciary in cases of an unjust conviction, the relief is wholly inadequate and a correction of the system has been made by statute. In this country where the functions of the judiciary and executive are sharply divided, the practice of relying upon pardons to correct the errors of the courts is still more unjust and ineffective.

(g)

Decisions on the power of Courts to grant without authority of statute new trials in criminal cases after the Term in which judgment was rendered.

The examination which has just been made of the powers of a court to alter its decrees, indicates in a general way that unless new facts are presented to the court in addition to those upon which the original judgment was based, the rule still holds good that at the end of the term a judgment made intentionally, and correctly recorded, will not be varied; but that where new facts are brought before that court in an appropriate manner, the exceptions to the unalterable nature of a judgment after the term are considerable.

It must be admitted, however, that except in so far as the court is expressly authorized by statute to grant relief, the numerical weight of authority denies its power to do so in a criminal case after the term at which a judgment of conviction has been entered, even though newly discovered evidence shows the conviction to have been improper. The following cases deny the right to give relief.

An unpublished decision of Dodge, J., rendered in the District Court on the remanding by the Circuit Court of Appeals of

Trafton vs. United States, 147 Fed. Rep., 513;

United States vs. New York Central R. Co., 164 Fed. Rep., 324 (C. C. A.);
United States vs. Rogers, 164 Fed. Rep., 520, 521;
Howard vs. State, 58 Ark., 229;
Beard vs. State, 81 Ark., 515;
Klink vs. People, 16 Colo., 467;
Saleen vs. People, 41 Colo., 317;
Dobbs vs. State, 62 Kans., 108;
Asbell vs. State, 62 Kans., 209;
Hamlin vs. State, 67 Kans., 724;
Holt vs. State, 78 Miss., 631;
Fugate vs. State, 85 Miss., 94;
State vs. Williams, 147 Mo., 14, 19;
Appo vs. People, 20 N. Y., 531;
Leache vs. State, 22 Tex. App., 279;
Kinch vs. State (Tex. Cr. App.), 156 S. W. Rep., 649;
State vs. Superior Court, 15 Wash., 339;
State vs. Armstrong, 41 Wash., 601.

It is to be observed in regard to these decisions, however, that many of them were decided in states where express statutory provisions were made defining the circumstances under which new trials should be allowed. It is not surprising where the Legislatures have undertaken such definition that the courts should feel limited by the boundaries thus marked out. The statement of certain circumstances as warranting a new trial or the statement of a certain period within which a new trial may be allowed, necessarily excludes the inference that new trials may be allowed under other circumstances or at a later day.

On the other hand, cases are not wanting which support the right of the court to grant relief. In

State vs. David (14 So. Car., 428), the appellant, Jeff David, at a special term of the Court of General Sessions, for Abbeville County, April, 1878, stood charged with murder. He was tried and found guilty, and was sentenced to be hanged on May 17, 1878, but the execution of this sentence was stayed by executive clemency. In October, 1880, a motion was made for a new trial on the ground of newly discovered evidence.

The Court said, at page 431:

> "Generally motions for a new trial must be made upon the minutes of the court and before the adjournment of the court at which the trial was had, or before sentence or judgment, or upon a case made up and settled by the judge who tried the case, and, when once thus heard, it is final. The order in such case cannot afterwards be reviewed either by the judge himself who heard it, or by another judge. These motions, however, are made upon matters growing out of the trial, and as to facts occurring at the trial, and when once passed upon, the action of the court is conclusive, unless an error of law is involved, giving a right of appeal to this court.
>
> But in the courts of law of the United States a party may, under certain circumstances, become entitled to a new trial on account of newly-discovered testimony; the ground being that the facts upon which he now relies are external to those which transpired at the trial.
>
> * * * * * *
>
> The right to a new trial on newly-discovered testimony, when sufficient, is as fully settled

and guaranteed by the law as any other, and this right cannot be lost because a new trial had once been refused upon facts wholly different from and not involving this newly discovered testimony.

It is true, as a general rule, such applications come too late if made after judgment, but it is within the discretionary power of the court still to hear, even after judgment entered, and even after the judgment has been affirmed on appeal. McMicken vs. Webb, 6 How., 293. If this is so in civil cases, how much more important is it in criminal cases, involving liberty and life. There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up, and also because it tends to perjury; and, as was said in the case of State vs. Harding, 2 Bay 268, it would have a mischievous tendency after all the evidence on the part of the state had been fully disclosed to allow one with his life in danger an opportunity, by the assistance of confederates, to procure unprincipled witnesses to contradict the evidence on the part of the state, and thereby defeat the ends of justice; but this case does not involve the discussion of the facts and principles which should control the court on motions of this kind.

The only question involved is the existence of this power; if it exists, no doubt it will be exercised wisely and discreetly. Our judgment in this case may be of no practical benefit to the appellant, but the case has come up in

> the regular channel of appeal, and it has become our duty to decide the questions of law involved. It is our opinion that the Circuit Court has discretionary power to hear and determine motions of the kind made in this case, and, therefore, that the Circuit judge was in error when he refused the motion on the ground of the want of legal power; and it is so adjudged."

In Maryland also even in civil cases and with apparently no limits other than those fixed by the discretion of the court, the power is asserted to alter judgments after the term has expired.

See Maryland cases cited in

> Phillips vs. Negley, 117 U. S., 665, 676;
> Gross vs. Wood, 117 Md., 362.

In Pennsylvania the rule seems the same.

> Wickel vs. Mertz, 49 Pa. Sup., 472.

In United States vs. Williams, 67 Fed. Rep., 384 the Circuit Court of Appeals for the Eighth Circuit held that a District Judge was justified in setting aside a judgment after the end of the term which had been entered under a mistake of fact owing to misrepresentations of counsel. Accordingly the appellate court refused to issue a writ of prohibition, saying (page 386):

> "The judge acted under a mistake of fact; his judgment was not invoked, and was not exercised, with respect to any of the terms or provisions of the alleged decree, and for that

reason it was not, in any proper sense, a judicial act."

It is perfectly clear that such a case cannot be brought within the customary exception of clerical errors. The original decision was a judicial act though made under a mistake. Justice required that it be set aside; but, if the court had asserted that its powers were as strictly limited as courts formerly did, the judgment could not have been set aside—at any rate at law—as may be seen from

Villars vs. Parry, 1 L. Ray., 182.

In United States vs. Radford, 131 Fed. Rep., 378 the District Court for the Western District of New York went far beyond what was requested of the District Court in the present case. Not only was a new trial granted after the term and after affirmance on error in that case, but on account of facts which might have been presented earlier. Hazel, J., said (page 380):

> "It is quite probable that the trial might have terminated differently, had the jury not been influenced by the untruthful testimony to which reference has been made. The responsibility of granting a new trial in a criminal case is a grave one, and I have not arrived at the conclusions herein expressed without misgivings. In courts of the United States a motion for a new trial is addressed to the sound discretion of the court, and where it appears to the court in a criminal case that harmful results are probable, by reason of the mis-

taken testimony of a truthful witness, the ends of justice are doubtless best promoted by allowing a new trial. It is undoubtedly true that this application should have been made earlier. It was within defendant's power to move for a new trial on the same affidavits now before the court very soon after the trial. His neglect to do so, however, in view of the peculiar circumstances of the case, ought not to deprive him of the right to another trial, where it appears, as here, that important material evidence was received upon the trial which is now shown to have been untruthful, and which facts have prejudiced the defendant's rights. Motion by defendant Radford for a new trial is granted."

In Crookes vs. Maxwell, 6 Blatch. 468 the head note reads:

"In this case, the Court, on the motion of the plaintiff made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages in the case to be corrected, the suit being one against a collector of customs, to recover back moneys paid, under protest, for duties, and the plaintiff not having been guilty of *laches*, and the errors being manifest."

In the United States vs. Millinger, 17 Blatch., 451 the head note reads:

"A judgment entered in 1872, on an assessment of damages, on a default, was opened in 1880, to allow evidence to be given of payments

made by one of the defendants, or out of his property, which should have been allowed, and deducted from the assessment, when the judgment was entered."

See also the dissenting opinion of Ward J., in United States vs. New York Central R. Co., 164 Fed. Rep., 324 (C. C. A.).

The decisions in which this court has held that after the close of the term neither its own judgments nor the judgments of lower courts can be altered, must be distinguished. In all these cases we believe that the court was dealing either with an application to vary a judgment upon the facts involved in the original decision, or with matters which, had the moving party been diligent, might have been presented during the term. As has been seen, the rule denying the power of a court so to act seems invariable.

In so far as the language of the decisions of this court may have gone beyond what was required by the facts, a distinction is to be observed between judgments of this court and judgments of an inferior court. An attempt to present new facts to the court to induce it to vacate or alter a judgment is in substance a new proceeding. This is as true when the procedure is by motion as when it is by writ of *audita querela* or of error *coram nobis* or by bill of equity. If this court has no original jurisdiction to deal with such matters, it could not properly vary its judgment even if new facts (showing for instance fraud or mistake) were presented after the term in which the judgment was rendered. But a lower court, having general original jurisdiction of the subject matter of suits of the character of that in question, would be under no such limitation of power.

(h)

Greater freedom should be allowed in criminal cases than in civil in granting new trials.

A principle to be considered before determining the power of the District Court to grant a new trial after the term is this: Where interests merely of money or property are at stake, it may be proper for a court to assume that errors which seem slight have not changed the result reached in a trial; but where the question is one of life or liberty and of reputation, the matter cannot be dealt with so lightly. This is recognized by the authorities. In Bishop's New Criminal Procedure (§1273), it is stated:

> "Numerous cases assume that the question whether or not to grant a new trial depends in criminal causes on the same rules as in civil. And it justly does as to a part of the rules. But we have seen that the burden of proof is in a degree different; and very different is the weight of evidence, which, in a criminal case, requires the jury to be satisfied of guilt beyond a reasonable doubt. Therefore, and because by the entire spirit of the criminal law the prisoner is under a protection from the judge which a party in a civil suit is not, many deem, it is believed rightly, that new trials should be awarded more freely in criminal causes than in civil, and in criminal the more freely in proportion to the gravity of the punishment."

The decisions fully sustain this quotation. Whether the court is dealing, as is most commonly the case, with questions of evidence, or with questions of errors of other kinds, the same view is taken.

> "The admission of illegal evidence in a civil case is comparatively unimportant. The judge disregards the incompetent evidence, and the judgment is based on that which is legal. But in a criminal case the judge has no such function. It is for the jury to convict, and it is presumed to act on all the evidence submitted. It is impossible to determine what influence has been exerted on their minds by illegal evidence, and it is the right of the accused to be tried on legal evidence alone. If that right has been invaded there has not been the fair trial guaranteed to all by the Constitution and laws. Hence this court is powerless to accept any suggestion, even if it were made, that without the improper evidence there was enough to convict."
>
> State vs. Callahan, 47 La. Ann., 444, 497.

See to the same effect

> Keliher vs. United States, 193 Fed., 8 (C. C. A.);
> State vs. Johnson, 40 Conn., 136, 143;
> Andersen vs. State, 43 Conn., 514, 517.

So where the ground of a motion for a new trial is not the erroneous admission or exclusion of evidence but that the verdict was against the evidence,

the same principle is applicable. In State vs. Wise, 83 Ia., 596, 599, the court said:

> "The rule in such cases is different from that applied in civil cases. This court, though proceeding carefully and cautiously, will interfere in criminal cases more readily than in civil."

And to the same effect are:

> State vs. Tomlinson, 11 Ia., 401, 403;
> Falk vs. The People, 42 Ill., 331;
> State vs. Hammond, 5 Strob., 91, 100;
> Owens vs. State, 35 Tex., 361, 362.

Similarly, for error in the charge of the trial judge, in Mitchell vs. State, 60 Ala., 26, 35, the court said:

> "If this were a civil suit, the error would be immaterial, and without injury. But, in a prosecution for an offense of this high grade, we are unwilling to apply the doctrine of error without injury. We cannot know what influence the charge may have exerted on the jury."

So in a criminal case the court refuses to hold the defendant responsible for errors of his counsel to the same extent as it would in a civil case.

> Keliher vs. United States, 193 Fed., 8, 10;
> State vs. Meshek, 61 Ia., 316.

And finally if, as in Freeman's case, the partiality of the jury is in question, the court will be most careful to protect the accused.

Troxdale vs. The State, 9 Humph., 411, 419.

Of all these matters, the most vital is that which concerns the fairness of the tribunal. Professor Wigmore who goes to an extreme in criticizing the freedom with which new trials have been granted by this court and other courts for errors in the admission or exclusion of evidence, concedes the necessity of protecting the right to a fair trial, saying of the defendant that:

> "He has indeed a legal right to a jury trial; and he has a right to a fair trial in general. But these are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object." 3 Col. L. Rev., 438.

(i)

Summary of the powers which the United States District Court has to grant a new trial in a criminal case after the end of the Term in which judgment was rendered.

The examination which has now been made of the various ways in which, by supplementary proceedings in the nature of a new action or otherwise, a judgment could be revised or relief obtained after the term in which judgment was rendered, affords the basis necessary to determine the powers of the Federal Court at the present day when these supplementary proceedings have in great measure

given way to motions. In Harris vs. Hardeman, 14 How., 334, 346 this court said:

> "As it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense,"

and similar procedure is adopted in most states.

Under the constitution of the Federal courts the provinces of law and equity are still kept distinct and therefore a Federal Court of law might not feel at liberty in a civil case to extend its power to grant relief by motion to situations where equity and equity only could have afforded relief at common law. But in dealing with criminal cases, no embarrassment need be felt. Equity had no jurisdiction over judgments in criminal cases, presumably because the government is a party to such cases and it is impossible to enjoin the government from enforcing a judgment rendered in its favor by a court of law against an accused defendant. Therefore, there is no occasion to limit the relief afforded on motion in a criminal case by the court of law which has given the judgment, by any narrower boundary than that of justice itself. In a civil case, it may be a reason for denying a motion that though the redress should be given, it must be sought by bill in equity. In a criminal case the relief, if proper as matter of justice, should always be granted on motion, because it can only be granted in that way.

Unless therefore some substantial reason of policy prevents, or the weight of authority is so great that even an archaic formalism of procedure can not be broken away from, the District Court should be conceded the power to grant a new trial after the term has expired where newly discovered material facts are brought before it.

If any substantial basis is sought today for the rule prohibiting the alteration or setting aside of a judgment after the term at which it was entered, all that can be found reduces itself to two propositions.

(1.) It is for the public good that litigation be finally terminated.

(2.) The parties are discharged from court when the term ends at which final judgment is given.

In regard to the first of these propositions a distinction must be taken between two different situations:

> (a) Where the court is asked to review its conclusion of fact or law without other facts than those which were before it when it rendered its decision or which might have been before it had the losing party exercised due diligence.
>
> (b) Where the court is asked to consider further facts which could not reasonably have been presented earlier and which show either that the decision of the court was erroneous or that a fair trial was not had.

As to cases of the first kind there is no answer to the argument of policy that there must be an end to the litigation and that the court's conclusion

must be accepted as final after the lapse of a fixed period. The remainder of the term in which judgment is entered affords opportunity to correct any errors that may have been made. These errors should be as obvious when the decision is rendered as at any subsequent time and may be called to the attention of the court at once within the term and corrected when correction seems necessary. Errors of the clerk in failing to record correctly the court's action stand on a different footing. Correction of such errors does not involve revising the judgment of the court but merely makes the record conform to the truth.

Where new facts are presented, however, a new case is presented for the decision of the court. To be sure the case relates to the same general matter as the original case and it may be argued that the whole matter in dispute should be finally disposed of by the first judgment. The well-settled practice in equity of revising judgments at law on account of newly discovered evidence is an answer to this argument. No one would seek to do away with this branch of equitable jurisdiction; and its existence and successful operation for centuries show that the courts have not found it impracticable to adopt the principle that it is never too late to do justice when new facts are presented which could not have been presented earlier and which show that a prior judgment was erroneous.

It may be conceded also that even where new facts are presented the greatest care should be exercised in granting a motion for a new trial. A just reluctance will always be felt in disturbing a prior decision unless strong reasons of justice require it and with lapse of time this reluctance will increase. But the trial courts can be safely

trusted to exercise proper discretion and to refuse motions which are without merit.

To go farther than this and to deny the court *power* to deal with the matter as justice may require where new facts have been discovered and there is no lack of diligence, is to exalt the mechanical technique of the law over its substance—to renounce flexibility of procedure in favor of the rigidity which has been recognized as perhaps the most fertile cause of any justifiable dissatisfaction with our legal procedure.

In the examination of judicial procedure which has been made by experts in recent years the unanimous conclusion is that a court should have elastic powers; that it should not be hampered by merely mechanical rules which deny it power to act as the exigencies of particular situations may require. The minute provisions of the Codes of many of our states have been criticized as based upon an erroneous theory. The statute of criminal appeals of 1907 in England and, indeed, all English procedural legislation since the Judicature Acts, illustrate the modern disposition to leave matters of procedure to the discretion of the court so far as possible.

All the arguments which tend in this direction in civil cases are ten times stronger when applied to criminal cases than when civil cases only are under consideration. To be deprived, by a purely technical rule, of money or property which justly belongs to one, when this can be proved and when there has been no fault in not making earlier proof, is hard enough; but when the stake is life or liberty and reputation, it is an intolerable grievance to lose when newly discovered evidence makes it clear that injustice has been done. More-

over, in a criminal case, undoing what has been done even after a long time works no injury to others, in working justice to the accused. There are no *bona fide* purchasers to be considered. No property rights will be disturbed. And while in civil suits the original winner will reluctantly part with his gains, and may feel harshly treated in being disturbed after the lapse of time, however unjust the original decision may have been, the government loses nothing which it should care to keep in reversing an unjust conviction of crime, when the injustice first appears, whether that is early or late. We venture to say that such a decision as Saleen vs. People (41 Colo., 317), must shock the sensibilities of every thoughtful person. There the innocence of the defendant had been proven by the confession and subsequent conviction of the real criminal. Yet, because the term had expired, the Court refused to set aside the conviction and suggested that the only recourse left to the deeply wronged defendant was to apply for a pardon. Such total inability of courts of *justice* to *administer* justice can only be confessed by members of the legal profession with downcast eyes and averted faces. It is no answer to say that a pardon was a shorter and more practical road to relief. That man was entitled to stand before the world, not as a *pardoned* man, but as an *unconvicted* man. That was his right for life and his childrens' right of heritage—for what greater heritage can one have than an ancestry unspotted of offense!

The utter failure of a pardon to place in *statu quo* one unlawfully convicted is nowhere better shown than in the case of Dr. Wm. G. Morton, who

was convicted with Freeman. For financial and other private reasons unnecessary to mention here, he did not sue out a writ of error with Freeman. Had he done so Judge Mayer would have had to grant him a new trial also. After he had served his term, the President pardoned him, having in mind especially that he could resume the practice of medicine in New York. Yet, by reason of the wording of the New York statute on the subject, he could not do so *because a conviction still stood of record against him.* And a special statute had to be passed before he could resume his calling.

The argument based on the fact that the parties are dismissed from court at the end of the term is easily disposed of. It only proves that they must be brought in again—that something equivalent to a new proceeding is necessary to bring them again before the Court. This was done in courts of equity by bills of review and for a new trial—at law by writs of *audita querela* and error *coram nobis.* The substitution of a motion for these writs does not alter the fact that substantially the proceeding is a new one by which the parties are brought afresh before the Court.

That a new writ is not essential for such a new proceeding is shown by the substitution of motions for the writs of *audita querela* and *error coram nobis.* These writs confessedly begin new proceedings and yet the Courts found no trouble in allowing a motion to be used as a substitute. There can be no greater difficulty in any other new proceeding which is closely related to the original one in bringing the parties before the Court by motion on suitable notice.

It will be urged, however, that the weight of authority is such as to make it impossible to allow the District Court to assert the power to grant a new trial after the term. If cases are to be counted numerically and all power of development denied to the common law, this may be true; but if attention is paid to the trend of authority and if weight is given to the principle that where there is a wrong, the Courts unless limited by statute, should provide a remedy, a conclusion favorable to the powers of the Court may be reached.

Nothing is more striking, on an examination of the authorities bearing upon the question, than the steady wearing away by statute, by equity, and by the common law of so much of the early rule as was merely an arbitrary rule of procedure, and the tendency to make such exceptions to the general rule as will fit the needs of litigants. The fight has been constant and has continued for many centuries between pure formalism in this matter and the light of reason. In the earliest period of the law, the Courts and clerks seem to have had no hesitation in correcting errors; and the writs of *audita querela* and error *coram nobis* were established that cases of hardship due to facts not presented to the Court at the original trial might be relieved. Later when the tendency to treat legal procedure as a fixed science whose boundaries were already finally determined, became powerful, it was necessary to pass repeated statutes of jeofails; and the courts of equity afforded a wider relief than had theretofore been possible. With the general tendency in the eighteenth, nineteenth and twentieth centuries to make the law more equitable and simple, the courts of law without the aid of statutes have

assumed gradually wider powers. In this country also statutes were passed authorizing the granting of a motion for a new trial within a considerable fixed period after judgment. These statutes show the dissatisfaction of the people, as represented by their legislatures, with the narrow original rule of the common law. The same spirit animates these statutes that gave rise to the statutes of jeofails. And the remedy which the modern statutes establish is in some degree open to the same objection which applies to the statute of jeofails. They are not wide enough and leave nothing to the discretion of the Court. If a period of one year, or two years is fixed as a final period, the Court is deprived of the power to give relief thereafter; yet the facts may be such as to show the greatest need for it. Gross fraud may not be discovered until after the lapse of the period named in the statute. It would, therefore, be better if the flexibility of a common law rule could prevail rather than the rigid statutory rules which have been established in many states. We believe that there is no reason why the Federal courts should not adopt a rule as liberal as circumstances make advisable. No statute hinders them. The Federal courts are of limited jurisdiction; but within that jurisdiction they have the fullest powers and should not restrict these powers by any self imposed rules of procedure which they assert that they themselves are incapable of breaking. The only Federal statute relating to the matter is Section 269 of the Judicial code which reenacted a similar provision in previous Federal laws. This section provides that Federal courts shall have power to grant new trials "for reasons for which new trials have

usually been granted in the courts of law." The reason why a new trial would be granted in this case if granted at all is because of the bias of a juror. This is one of the reasons for which new trials were always allowed at common law. The statute does not control *the time* within which new trials may be granted for these reasons. It has not even precluded the Federal courts from granting new trials in cases of felony for the reasons for which new trials have usually been granted in misdemeanors and in civil cases, although in England new trials in cases of felony were never allowed at common law.

See for the English law, Reg. vs. Murphy L. R., 2 P. C., 535.

Compare Sparf vs. U. S., 156 U. S., 51, 175.

The freedom of the Federal courts from statutory restrictions in the matter of new trials is to be contrasted with the restraint of many state courts. The codes of many states provide with elaborate detail for the cases in which new trials may be had or judgments amended. It is a natural construction of such statutes that these definite provisions exclude the Court from the exercise of any discretion. *Expressio unius, exclusio alterius.* Cases, therefore, decided by such Courts are not fairly to be urged as opposed to the principle that the procedure of a Court should be so adjusted as to provide for possible contingencies, so that where there is a right in justice there should be a remedy at law; and the Federal District Court may act on this assumption.

We have already shown that there are not a few decisions which go to the full extent we suggest.

And under these circumstances there seems no reason why this Court should not put the whole matter on a basis consistent with reason and with boundaries limited only by justice; rather than assert that irrespective of reason an archaic rule of procedure so ties the hands of the Courts that they have no right even to consider what is just.

Many years ago one of the English judges remarked that the common law was fitted to the genius of the nation, and no better reason can be found for the ancient rule refusing new trials in criminal cases. The Sovereign was a part of the judicial system. It was his duty to pardon on recommendation of a judge that one had been unlawfully convicted. The sense of justice of that day and nation revolted at the idea of making a man defend himself twice. The Sovereign could have one day in court. Such a conviction should not be executed, hence the man should go free. As matter of right, therefore, a pardon was recommended and granted. And the people were not shocked at the idea that a guilty man might thus escape, or an innocent one might have his record besmirched. It was court made law, suited to the genius of the nation—the administration of justice according to the national sense of justice.

But in this twentieth century, America is a nation of different genius from England of the seventeenth century. Our people more and more demand that the law get its pound of flesh. We are each day more insistent that the guilty shall not escape, either by pardon or otherwise, the punishment which the law decrees unto them. This is because the present day conscience more fully realizes the moral offense in crime. And for the same reason

the present day conscience is more sensitive to the importance of clean character and untarnished reputation.

Our pardoning power is absolutely separate from our judicial system and under no obligation to follow a recommendation to mercy. The Executive might hesitate to pardon one merely because of his unlawful conviction, even though it were pointed out that our courts had no power to grant a new trial. Some judges might be slow to recommend a pardon on that ground only. Perhaps demagogues would freely assail an Executive granting such a pardon or a judge recommending it. Yet what Executive, what judge, what thoughtful citizen, would not stand aghast at the idea of a conviction executed under such circumstances? What American layman would not openly express his contempt if told that a fellow citizen, possibly innocent, was in prison as a convicted felon, because our courts, while admitting his unlawful conviction, expressed themselves as unable to help him, by reason of a rule created centuries ago by the courts of another nation having at that time a different sense of the administration of justice!

Can not the common law of America be fitted to the genius of the American people, so as to administer justice according to the national sense of justice?

(j)

Even though the lapse of the Term deprived the District Court of jurisdiction, the Government's consent to the hearing of the motion for a new trial restored that jurisdiction.

Following the order of the questions certified, we have discussed Question II, and have considered the case without reference to the consent of the Government to the assumption of jurisdiction by the District Court. But even though it be granted that otherwise the District Court would have had no jurisdiction to entertain a motion for a new trial after the close of the term in which judgment was rendered, it seems perfectly clear that the consent of the Government to the hearing of the motion and to its decision on the merits gave the Court jurisdiction. It is the rule not only in regard to the Federal Courts but in regard to the jurisdiction of courts generally, that, though jurisdiction of the subject-matter of a litigation must be given by law, and cannot be conferred by consent, yet when jurisdiction of the subject-matter is given by law, the parties may waive other conditions of jurisdiction, since they are regarded as established for the benefit of the parties and not to mark the boundaries of the Court's powers. Thus, it is fundamental that a general appearance waives defects of service and lack of jurisdiction over the person. A common illustration of the principle is found also in the decisions of this Court holding that where the parties to a controversy are of diverse citizenship, the Federal Court has jurisdiction which may be invoked in any district in which the defendant

consents to be sued; and such consent is implied from failure to make seasonable objection.

Gracie vs. Palmer, 8 Wheat., 699;
Taylor vs. Longworth, 14 Pet., 172, 174;
St. Louis & San Francisco Railway vs. McBride, 141 U. S., 127;
Texas & Pacific Ry. vs. Cox., 145 U. S., 593;
Central Trust Co. vs. McGeorge, 151 U. S., 129.
In re Moore, 209 U. S., 490;
Western Loan Co. vs. Butte & Boston Min. Co., 210 U. S., 368.

A case more similar to the present, arises where litigation has been removed from a State Court to the Circuit Court of the United States but the removal has not been made within the time fixed by statute. It has been held in such a case that by the consent of the other party to the litigation, as shown by appearance and failure to object to the removal, the Circuit Court was given jurisdiction.

Martin's Admr. vs. Baltimore & O. R. Co., 151 U. S., 673;
In re Moore, 209 U. S., 490.

In the former case Mr. Justice Gray, at page 688 said:

> "The time of filing a petition for the removal of a case from a State Court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the National Court under the Constitution

> of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district."

And this language was quoted with approval in the later case, at page 504. The analogy of this case to the case at bar is obvious. Here too, the District Court had jurisdiction of the subject-matter of criminal prosecutions of the character of the one at bar. Here too, the difficulty in regard to jurisdiction to make an order for a new trial which is under consideration is based merely on the lateness of the order. If time "is not a fact in its nature essential to the jurisdiction of the Court" in on case, it is not in the other.

The precise point that lapse of the term is not jurisdictional has been several times decided in State Courts.

In Gage vs. City of Chicago, 141 Ill., 642, the head note reads:

> "On a proceeding to condemn three tracts of land, a new trial was awarded at the second term after verdict and judgment, by consent of the parties; and thereupon the Court, on its own motion, entered an order granting a new trial as to the other party who objected thereto: *Held*, that it was error to grant the new trial as to the party objecting, but that

the error was cured by his subsequent election to proceed in the second trial."

In Hewetson vs. City of Chicago, 172 Ill., 112, 115, the Court said:

> "In the opinion rendered in the case of People vs. Hawes, 25 Ill. App., 326, in the Appellate Court for the First District, which opinion was approved and adopted by this Court on appeal (129 Ill., 124), it was said: 'The records of a Court are not so far closed at the end of the term that the parties may not appear at a subsequent term and by agreement authorize the Court to open them and take further proceedings. Can it be doubted, for example, that where a judgment is entered by default at one term the parties may appear at a subsequent term and by stipulation authorize the Court to set the judgment aside and give leave to the defendant to defend?' * * * We see no reason, either in law or public policy, why any proceeding, however final or conclusive, where the rights of no third party have intervened, may not be opened by the Court where all the parties so agree, and the Court be thus re-invested with jurisdiction to take further proceedings."

In Gager vs. Doe, 29 Ala., 341, 344, the Court said:

> "In the case of Byrd vs. McDaniel, 26 Ala., 582, the chancellor had dismissed the bill, and the case was out of court—finally disposed of. At a snbsequent term, when he had no author-

ity whatever over the case, he made an order reinstating it upon the docket, against the objection of defendant. The identical papers which composed the file of the dismissed case, were the papers of the case thus reinstated. This Court said that the defendant might have treated the entire proceeding as *coram non judice;* but because he 'engaged in the defence, by crossing interrogatories, entering into consent, objecting to proof as illegal, &c.,' it was considered that he waived the objection, and the case was again in Court. That case was much stronger for the appellee, than this. Here, the record shows that the order for change of venue was, by the consent of the parties, rescinded by the Circuit Court of Mobile County, and the case reinstated on the docket, at the fall term of that Court, 1851. The case was then regularly continued on the docket, until spring term, 1855, when for the first time motion was made to strike the case from the docket. The Court rightfully overruled the motion.—Hair vs. Moody, 9 Ala. 299; Lampley vs. Beavers, 25 Ala., 534; Rose vs. Thompson, 17 Ala., 628; Vaughan vs. Robinson, 22 Ala., 519."

In Berry vs. Nall, 54 Ala., 446, 449, the Court said:

"The Court had jurisdiction of the subject-matter of the suit; a trial of it was afterwards had in that Court, in which defendant appeared and took part, and this was a waiver of the objection that the cause was not there. If the defendant intended to insist on that

proposition, he should have done so by treating the proceeding as *coram non judice*, and taking no part therein, or have applied for a writ of prohibition or some similar process to prevent them. Byrd vs. McDaniel, 26 Ala., 585; Hair vs. Moody, 9 Ala., 399."

In Kidd and Stainton vs. McMillan, 21 Ala., 325, 327, the Court said:

"It is very clear, that the Court has no authority to set aside a final judgment after the term is closed at which it was rendered. Noland vs. Lock, 16 Ala., 52; Walker vs. Hale, 16 Ala., 26. But if the parties agree that it may be set aside and tried again, and the Court, in pursuance of such agreement, does set the judgment aside, and proceeds again to try the cause, the second judgment is not void for want of jurisdiction. Lee vs. Hogan, Admr., decided at the last term (20 Ala., 301)."

In Royal Trust Company vs. Exchange Bank, 55 Neb., 663, 668, the Court said:

"There is the further question, did the county judge have the authority to make the order" (setting aside judgment) "on a date out of regular term time? It has been decided that such an 'order is voidable, not void' (Hansen vs. Bergquist, 9 Neb., 269); also, in the same opinion, that with the consent of parties the order may be made out of term time; and further, in the absence of proof or showing to the contrary, such assent will be presumed."

In Newman vs. Newton, 14 Fed. Rep., 634, 635, the Court said:

> "Without consent of parties, it is believed that the Court has no power to vacate a judgment after the term has passed in which it was entered."

See also,

Wilson vs. Vance, 55 Ind., 394.
National Home vs. Overholser, 64 Ohio St., 517.
Harrison vs. Osborn (Okla.), 114 Pac. Rep., 331.
McHam vs. Gentry, 33 Tex., 441.
McCord-Collins Co. vs. Stern, Tex. Civ. App., 61 S. W. Rep., 341.

The decisions to the contrary of Little Rock vs. Bullock (6 Ark., 282); Anderson vs. Thompson (7 Lea., 259) are opposed to principle, to practical convenience and to the weight of authority.

The Government is as fully bound by the assent given by the District Attorney who represented it as an ordinary litigant would be by the assent of authorized counsel.

Johnston vs. Stimmel, 89 N. Y., 117.

II.

The pendency of a writ of error when the motion for a new trial was made did not defeat the jurisdiction of the District Court.

(a)

Even though the Government had not consented to the jurisdiction.

It is conclusively established by the case of Fuller vs. United States, 182 U. S., 562, that where a lower court is given statutory authority to grant a new trial within a stated period, this power may be exercised although the case has been carried by appeal or writ of error to a higher court and even though that court has affirmed the original decision.

In the statute in question in this case, and in the statutes in question in the earlier cases of United States vs. Young, 94 U. S., 258, and Belknap vs. United States, 150 U. S., 588 (where a statute giving the Court of Claims authority to grant new trials was construed) there were no express words requiring the result reached by the decisions. These decisions were based merely on the fact that during a fixed period the lower court was given a right to grant a new trial. It can make no difference whether this right on the part of the trial court is given by statute or exists at common law. Accordingly, these decisions involve the conclusion that at any rate during the term in which the judgment of the lower court was rendered, that court may, in spite of writs of error, grant a new trial and assume anew jurisdiction over the case. Likewise if the lower court is by common law authorized under special circumstances after the close of the term to grant a new trial, the same consequence must follow. The principle cannot be stated more narrowly than this: Whenever the lower court would be regularly warranted in granting a new trial if no writ of error were pending, it is similarly justi-

fied in granting a new trial in spite of the pendency of the writ.

Cases where the decision of which review is sought is a decree in equity, as In re Potts, 166 U. S., 263, need be referred to only to distinguish them. In equity the practice has been established of requiring leave of the appellate court as a condition precedent to any revision, by bill of review or otherwise, of the decree of the court after the expiration of the term at which it was rendered. Such procedure has never prevailed in actions at law. This distinction between the revision of judgments at law and decrees in equity is stated in Fuller vs. United States, 182 U. S., 562, 567. The revision by equity of judgments at law requires no leave of the appellate court; nor does pendency of a writ of error limit the powers of the court of equity. In Johnson vs. St. Louis &c. Railway, 141 U. S., 602, 610, the court said:

> "The question raised as to the jurisdiction of the court below in this suit is disposed of by the ruling in Parker vs. The Judges, 12 Wheat., 561, where, while a writ of error was pending in this court, a bill in equity was filed in the court below, and an injunction issued to stay proceedings on the judgment. After the judgment had been affirmed here, an order was issued by this court to show cause why that court should not issue an execution on the judgment. It was contended that an injunction could not be awarded while the record was before this court on a writ of error. This point was thus disposed of, Chief Justice Marshall delivering the opinion of the court: 'We do not think this a valid objection. The

suit in chancery does not draw into question the judgments and proceedings at law, or claim a right to revise them. It sets up an equity independently of the judgment, which admits the validity of that judgment, but suggests reasons why the party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal.' See also Marshall vs. Holmes, ante, 589, and cases there cited."

If this principle is applicable to cases where a bill in equity is the appropriate remedy for affecting the original judgment it must be equally applicable where a motion is adequate to produce the same result.

Where a motion for a new trial based on newly discovered evidence is permitted in the state courts, the pendency of appellate proceedings is no bar to the entertaining of the motion by the lower court.

See

Fuller vs. United States, 182 U. S., 562, and cases cited at pages 572-574;

also

Cook vs. Smith, 58 Ia., 607;
Henry vs. Allen, 147 N. Y., 346;
Birnbaum vs. May, 170 N. Y., 314;
Fricke vs. The State, 11 Tex. App., 6.

The necessity for this procedure is obvious. The writ of error does not carry to the appellate court

the facts on which a motion for a new trial, because of newly discovered evidence, relied, nor can the appellate record be amended to include these facts.

Burchett vs. United States, 194 Fed. Rep., 821;
State vs. Offutt, 38 La. Ann., 364.

Accordingly, unless the lower court can act, the newly discovered evidence cannot be made use of in any way.

Nor is there any technical difficulty in permitting this. A writ of error though in substance a method of continuing in a higher court the litigation in a case,

See

Cohens vs. Virginia, 6 Wheat., 264;
Nations vs. Johnson, 24 How., 195;
In re Chetwood, 165 U. S., 443, 461;

nevertheless involves only so much of the litigation as relates to the errors carried to the upper court. This jurisdiction is not interfered with by the action of the lower court in granting a new trial.

(b)

Consent to the jurisdiction of the District Court involves consent to the discontinuance of the writ of error if the District Court grants a new trial, and, therefore, avoids any possible objection due to the pendency of the writ of error.

If the writ of error should be thought to deprive the District Court of jurisdiction, discontinuance

of the writ must revive that jurisdiction; and in this case the writ must be regarded as, in effect, discontinued. Whether the accused has the absolute right thus to discontinue and dismiss his writ of error without leave of the appellate court is unimportant. Certainly with the assent of the Government any requisite to obtaining leave of court may be assumed. This has been shown in an earlier part of this brief. It has been seen that the request of the accused that the District Court should hear the motion for a new trial, and the consent of the District Attorney thereto, necessarily involve this attitude on the part of the accused and the government: The accused impliedly assented to discontinue his proceedings in the appellate court and that the District Court should resume jurisdiction of the case, *provided* the motion for a new trial was allowed. This inference is necessary because the appellate proceedings would be wholly useless to the accused if the District Court granted a new trial. If it is true that while the case is pending in the appellate court, the District Court could not properly try it, because a new trial by the District Court would involve a reassumption of jurisdiction over the case and consequently would require a release of jurisdiction by the appellate court, this is an added reason for the inference, since asking for a new trial involves assent to anything necessary to make it possible. Of course this assent of the accused was wholly conditional on his motion being granted.

On the other side, the District Attorney must also be regarded as assenting to the reassumption of jurisdiction by the District Court, if any such

assent on the part of the government is necessary. When he assented to the hearing of the motion for a new trial on its merits, and waived objection to the jurisdiction, he must likewise be regarded as assenting to anything requisite to make that jurisdiction effective. If, as matter of form, the dismissal of the writ of error should precede the entry of the order of the District Court, the way in which the latter court announced the order it was prepared to make, without actually entering the order, leaves the way open for that course.

We do not think it necessary to make any reply to the portion of the government's brief devoted to the argument that the District Court was without jurisdiction to set aside the judgment of conviction and order a new trial (pages 13-20).

We have fully examined the authorities and stated our position already. In regard to the authorities cited by the government, however, we desire to call the attention of the court to the fact that on pages 18 and 19 the government seems to confuse the procedure in bills of review to revise decrees in equity, and the procedure in revising, by bill in equity or motion, judgments at law. The difference in the procedure has already been called to the attention of the court in our brief and was carefully noted by this court in the case of Fuller vs. U. S., 182 U. S., 562.

CONSIDERATION OF QUESTION III.

"Whether, when a District Court has itself raised the question of its jurisdiction to entertain a motion made after the expiration of the term to vacate a judgment of conviction and the United States Attorney thereupon tendered its consent to the hearing of the motion on the merits if the jurisdictional question raised by the Court were dependent on that consent, the United States is debarred by such tender from raising the question of jurisdiction of the District Court to vacate said judgment?"

I.

The question at issue.

The question certified appears to be hypothetical, for the question before the Circuit Court of Appeals is not whether the government by its consent is debarred from *questioning the jurisdiction* of the Court, but *whether it is entitled to the writ of prohibition against the Court,* and, therefore, this discussion will be confined to the latter question. (See page 18, supra.)

This very distinction between the question certified and the question at issue in the Circuit Court of Appeals seems to be exactly the distinction between those cases where the government is barred and where it is not barred. We are not dealing here with the question whether consent can confer jurisdiction; nor with the question whether the government is bound *as against the defendant Freeman* by its agreement made with *him*. Ex-

hibit A not only constituted an agreement between the government and Freeman, *but was also an agreement between the government and Judge Mayer.* And the only question that we have to deal with here is whether a litigant can repudiate its agreement made with the *Court* and can by a writ prevent the *Court* from doing that which the litigant has expressly agreed that the *Court* may do.

Let us illustrate: Suppose in a civil case a defendant moved for a new trial after the term, and suppose that plaintiff stipulates with defendant not to question the Court's jurisdiction and that question is not raised before the Court in any way, but that the motion is argued on its merits and a new trial is granted, *and the order entered;* then suppose plaintiff sues out a writ of error to test the jurisdiction of the Court. Now, let us grant for the purposes of this argument, that the plaintiff would not be bound by that decision because of his failure to object to the Court's jurisdiction, and that as against the *defendant,* plaintiff could, upon his writ of error, question the jurisdiction of the Trial Court to grant the new trial. *But here we have a case where, after making an explicit agreement with the Trial Court that the latter may decide the motion upon its merits, the plaintiff seeks to repudiate its agreement with the Court and by a judicial writ to prevent the Court from doing that which it has agreed that the Court may do.* We hope that this illustration makes clear the distinction.

The government must be bound to know the rule of law that in this, a criminal case, it could not sue out a writ of error if Judge Mayer should grant the motion. Hence its consent to have Judge

Mayer decide the motion on its merits included a consent to have the order entered pursuant to the Court's decision; and so Exhibit A is really an agreement made between the government and Judge Mayer that he shall decide the motion on its merits and shall enter an order granting a new trial if he so decides, and that the government will abide by it. And now, after Judge Mayer has performed the stipulation on his part, the government comes forward and repudiates its agreement made with him and seeks by judicial process against *him* to prevent him from doing that which it has agreed to permit him to do, to wit, to enter the order. *And whether the government will be permitted to do this is the question before the Circuit Court of Appeals.*

II.

The motive of the Government in giving its consent in Exhibit A is immaterial.

We repeat here our argument hereinabove made (*supra*, page 41) that the reasons or motives of the United States government for giving the consent in Exhibit A are of no importance. The United States Attorney knew that he was consenting and what he was consenting to. If, indeed, at the time of making Exhibit A he did not believe that the District Court had jurisdiction of the motion, but in the hope that Judge Mayer would vindicate his office, made an agreement with Judge Mayer that he considered void, and thought that he could thereafter repudiate it as against Judge

Mayer if the fate of war went against him—then indeed we have a very serious question whether under such circumstances and because of such a motive, a litigant can enter into a compact with the Court, and when he finds that he has lost, repudiate his agreement and seek by judicial process against the Court himself from having that Court carry out the agreement. We again submit that the reasons inducing the government's consent in Exhibit A have no bearing upon its binding legal effect.

III.

The authorities indicate that failure to object to jurisdiction debars the right to the writ.

There is not much discussion in the decisions concerning the effect of consent to jurisdiction or failure to object to jurisdiction, upon a litigant's right to the writ of prohibition. Re Huguley Mfg. Co., 184 U. S., 301:

> "It is firmly established that where it appears that a court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the Court is doubtful or depends on facts which are not made matter of record, the

granting or refusal of the writ is discretionary. In re Rice, 155 U. S., 396. And that the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and is only granted as a general rule where there is no other adequate remedy. In re Atlantic City Railroad Co., 164 U. S., 633."

In re Alix, 166 U. S., 136—to the same effect.
In re Rice, 155 U. S., 396-402—to the same effect.
In this last case the Court says (page 403):

"Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition."

See also Smith vs. Whitney, 116 U. S., 167, at page 173:

"It is often said that the granting or refusing of a writ of prohibition is discretionary, and, therefore, not the subject of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the Court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that Court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of

right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities."

In considering the effect of these decisions, we must remember that three classes of cases might come before a Court:

(1) Cases where petitioner is entitled to the writ as matter of law.

(2) Cases where he may or may not be entitled to the writ—in the discretion of the Court.

(3) Cases where he will be refused the writ as matter of law.

Now in all the foregoing decisions it will be noticed that the Court was only discussing the first two classes of cases, i. e., they hold that under one state of facts the petitioner is entitled to the writ as matter of right and that under the other state of facts he may only receive it in the discretion of the Court. None of them pretend to say when it will be refused as matter of law. And we notice that in stating when the petitioner is only entitled to the writ in the discretion of the Court, in no instance does the Court give the state of facts which we have here. They say that *if the Court is clearly without jurisdiction, and if the petitioner has objected at the outset,* and if he has no other remedy, he is entitled to the writ

as a matter of right; but where he has another legal remedy or where the jurisdiction is doubtful or depends on some facts not of record, there the granting or refusal is discretionary. *Now it is of importance to notice that none of these decisions say that the granting or refusal of the writ is discretionary if the petitioner did not object to the jurisdiction of the Court at the outset, or if he consented to it.* That important fact is omitted and none of these decisions discuss what effect failure to object to the Court's jurisdiction will have upon his right to the writ. But we do note that in Re Rice (155 U. S., 396, 402) the Court says: "Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition." Does this not indicate that in such cases the Court *must* exercise its discretion by refusing the writ—in other words, that the writ must be refused as matter of law?

And in Harris vs. Brooker, 8 Wash., 138, the Washington Supreme Court reversed a judgment of the Superior Court granting a writ of prohibition because of the failure to object to the jurisdiction at the outset. The Court holds that the writ will not issue unless objection to the jurisdiction is raised in the Court to which the writ is sought to be addressed. The Court says:

> "And the return of the judge to the alternative writ shows the justice of this rule, and the injustice of allowing a Court to be subjected to this writ, and to the costs following it, before it has had an opportunity to pass upon the question of jurisdiction which is assailed * * * It seems to us that it is re-

quiring very little of the petitioner to demand that he should at least bring the point of jurisdiction to the notice of the Court before he asks a superior tribunal to prohibit it from exercising such jurisdiction."

Now this decision appears to rest upon the principle that the writ will be refused as matter of law unless objection to jurisdiction is made at the outset. *Notice that the Superior Court had granted the writ and that this case reverses the judgment. If the granting or refusal of the writ under these circumstances had been a matter of discretion in the Superior Court, would the Supreme Court have reversed it?* There is no talk in the decision that there was an abuse of discretion by the Superior Court; nor do any other facts appear of moment save this one fact of failure to object to jurisdiction. The case seems to hold that as matter of law the writ will be denied unless objection to the jurisdiction is made at the outset in the Court to which the writ is sought to be addressed. In Re Rice (155 U. S., 396) the writ was sought in the first instance in the Supreme Court. And, therefore, it might possibly be argued that the refusal to grant the writ there was an exercise of its discretion by this Court. If that is so, it indicates how a Court should exercise its discretion. But the decision in Harris vs. Brooker, 8 Wash., 138, must rest upon the principle that as matter of law the writ will be refused unless objection to the jurisdiction is made at the outset.

IV.

The Government is debarred from the writ because it has no standing in the Circuit Court of Appeals upon the writ of error.

We repeat our argument made on pages 41 et seq. supra, that when the government agreed not to contest Judge Mayer's jurisdiction, it agreed to consent to a withdrawal of the writ of error if Judge Mayer should grant the motion for a new trial. Certainly, if a stipulation made between parties litigant to consent to jurisdiction binds them to a removal of all obstacles to jurisdiction in so far as they can do so, then certainly an agreement between a litigant and the court, consenting to the court's jurisdiction, must bind the litigant to do all things in so far as he is able to confer that jurisdiction. If Exhibit A, in its aspect as an agreement with the defendant, includes an agreement to consent to a withdrawal of the writ of error; then in its aspect as an agreement with the District Court it must certainly include the same thing. And if Exhibit A practically amounts to a stipulation to consent to a withdrawal of the writ of error, what standing has the government in the Circuit Court of Appeals to-day as a petitioner for the writ?

On page 44, supra, in discussing the jurisdiction of the Circuit Court of Appeals, we have argued that the Circuit Court of Appeals has no jurisdiction to issue the writ of prohibition because Exhibit A deprived the government of any rights which it might have under the writ of error. And we there ask this question: "How can a court

exercise its jurisdiction when there is no one who can invoke it?" That question was asked in order to point out the fact that the Circuit Court of Appeals no longer could exercise any appellate jurisdiction herein on behalf of the government because the government had barred itself from any right to relief there. We now ask the question: *How can a petition for the writ of prohibition be maintained in a court by a person who has no standing in that court?* We must not be misled on this point by the rule of the common law. In England, the King's Bench seems to have had jurisdiction to issue the writ even on the petition of any third person, and without regard to the question whether the writ was necessary for the exercise of its jurisdiction by the King's Bench. But here we are dealing with a statute. Under Sec. 262, plainly a stranger cannot maintain the writ because he has no standing in the Circuit Court of Appeals. And is not this just the position in which the government has placed itself by making the agreement in Exhibit A? Exhibit A worked both ways. By removing the government from any standing in that court, it deprived the Court of jurisdiction to issue the writ and deprived the government of any right to the writ.

Answer to Government's Brief on this Question.

We do not deem it worth while to reply to the argument of the government on this question. Their whole contention seems to be that where a court lacks jurisdiction of the subject matter,

legal jurisdiction thereof cannot be obtained by consent. We have no desire to quarrel with that proposition. We merely reiterate what we have hereinbefore argued, to wit, that lapse of time is not jurisdictional in this sense and that the question before the Circuit Court of Appeals is not whether the government is debarred from questioning the District Court's jurisdiction but whether the government by its consent is debarred from procuring the writ of prohibition against the court.

IN CONCLUSION.

The foregoing authorities, suggestions and arguments are advanced in the hope that they may be of assistance to the court in its endeavor to make such disposition of the matter at issue as shall accord with sound principles of law and the due administration of justice.

Respectfully submitted,

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